(33,888)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 579

INTERNATIONAL SHOE COMPANY, APPELLANT,

vs.

STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AND C. EUGENE STEPHENS, STATE TREASURER OF THE STATE OF MISSOURI

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

INDEX

	Original	Print
Record from the district court of the United States, Western Missouri	6	1
Citation and service (omitted in printing)	6	
Caption (omitted in printing)	1	
Minute entry of filing of complaint and stipulation	1	1
Bill of complaint	3	1
Appendix "A"—Corporation annual franchise tax law	27	23
Appendix "B"—Stock corporation act	37	31
Stipulation re enforcement of franchise tax bill	45	37
Minute entry of filing of order to show cause, etc	46	38
Order to show cause and marshal's return	46	38
Summons and marshal's return	49	40
Minute entry of filing of answer	50	41
Answer	50	42
Minute entries of order transferring cause, etc	56	47

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 4, 1929

	Original	Print
Opinion, Reeves, J.	58	48
Order denying application for temporary injunction	67	55
Minute entry of filing of petition for appeal, etc.	67	55
Petition for appeal	68	56
Assignments of error	69	56
Bond on appeal (omitted in printing)	76	
Order allowing appeal	77	63
Minute entry of filing of citation, etc.	78	63
Stipulation re transcript of record	78	64
Clerk's certificate (omitted in printing)	80	
Statement of points to be relied upon and designation to print entire record	81	64

[fols. a-c] Citation, in usual form, showing service on Stratton Shartel et al., filed Nov. 21, 1928, omitted in printing.

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN MISSOURI, CENTRAL DIVISION

No. 223

INTERNATIONAL SHOE COMPANY, a Corporation, Complainant,

vs.

STRATTON SHARTEL, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, Defendants

MINUTE ENTRY OF FILING OF COMPLAINT AND STIPULATION—July 9, 1928

Now on this day comes the complainant, by its solicitors, and files its bill of complaint against the defendants; there is also filed a stipulation of counsel that defendants will not enforce or attempt to enforce against complainant the franchise tax bill.

IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed July 9, 1928

To the Honorable Judges of the District Court of the United States for the Central Division of the Western Judicial District of Missouri:

The complainant, International Shoe Company, a cor-[fol. 2] poration, brings this, its bill of complaint, against the above named defendants and respectfully shows unto this Honorable Court, as follows:

I. The Complainant International Shoe Company, avers that it is a corporation duly organized under and by virtue of the laws of the State of Delaware and authorized to engage and engaged in the business of manufacturing and selling shoes and was duly licensed and qualified to do business in the State of Missouri on the 22nd day of March, 1921, and ever since has been and now is so licensed and qualified and since said 22nd day of March, 1921, complainant has maintained and now maintains its principal business office in the City of St. Louis, Missouri; that defendant Stratton Shartel is the duly qualified and acting Attorney General of the State of Missouri and as such is charged with the duty of enforcing the payment to said state of corporation franchise taxes that the State Treasurer of said state reports to him are delinquent; that defendant C. Eugene Stephens is the duly elected, qualified and acting State Treasurer of the State of Missouri, and as such is charged with the duty of the collection of corporation franchise taxes ascertained, levied and assessed under the laws of said state and of certifying to the Attorney General a list of the corporations delinquent in the payment of their franchise taxes; that plaintiff, by reason of its incorporation under the laws of Delaware, is a citizen and resident of the State of Delaware; that the said defendants are bona fide citizens of the State of Missouri and reside in the City of Jefferson City, County of Cole and State of Missouri in the Central Division Western Judicial District.

II. This is a suit of a civil nature, wherein the matter in controversy exceeds the sum of three thousand dollars exclusive of interest and costs, arising under the Constitution of the United States, especially under Section 1 of the Fourteenth Amendment and under Section 8 of Article 1 of said Constitution, and the purposes of said suit are: (a) To have declared unconstitutional and void Section 12 [fol. 3] of the Stock Corporation Act of the State of Missouri as an amendment or supplement to the Corporation Annual Franchise Tax Law of Missouri and the said Franchise Tax Law of the State of Missouri, if said section 12 be an amendment or supplement thereto; (b) to have declared unconstitutional and void the action hereinafter re-

ferred to of the State Tax Commission of Missouri in computing under the laws of Missouri complainant's corporation franchise taxes for the year 1928; (c) to have declared unconstitutional and void the action of the Auditor of the State of Missouri in making out and delivering to the State Treasurer of said state a tax bill in conformity with said computation of said Tax Commission; (d) to have said tax bill and the taxes represented thereby, hereinafter referred to, adjudged unconstitutional and void; (e) to remove from complainant's property in the State of Missouri the cloud cast upon the title thereof by the said franchise tax bill and the taxes represented thereby; and (f) to restrain the enforcement of the said Corporation Annual Franchise Tax Law of Missouri as amended or supplemented by said Section 12 of the said Stock Corporation Act according to the construction of said section 12 by the Supreme Court of Missouri, by enjoining and restraining defendants from collecting or attempting to collect from complainant said franchise taxes assessed and levied against complainant, all upon the ground that said Corporation Annual Franchise Tax Law as supplemented or amended by said Section 12 of the Stock Corporation Act and the assessment of franchise taxes thereunder are unconstitutional and void in the particulars hereinafter set forth.

III. Complainant avers that it was incorporated under the laws of the State of Delaware, and under its charter and the laws of said state it is authorized to issue an aggregate of 4,250,000 shares of stock, of which 250,000 were to be preferred shares of the par value of $100.00 each, amounting to the aggregate nominal or par value of $25,000,000.00, and 4,000,000 were to be shares without nominal or par value; that for the consideration of $10,000,000.00, or $100.00 per share paid to and received by it, complain-
[fol. 4] ant issued and there are now outstanding 100,000 of said authorized preferred shares, and for the consideration of $36,082,631.09, or $9.60 per share paid to and received by it, complainant has issued and there are now outstanding 3,760,000 of its said authorized shares without nominal or par value.

That by action of its board of directors under and in conformity with complainant's charter and by-laws and as required by the laws of the State of Delaware, the aforesaid consideration received for said shares was made and is complainant's capital or paid-in capital stock or stated capital.

That therefore complainant's outstanding or paid-in capital stock is $46,082,631.09, of which $10,000,000.00 is divided into and is represented by 100,000 shares of preferred stock of the par value of $100.00 each, issued and outstanding, and $36,082,631.09 is divided into and represented by 3,760,000 shares of common stock without par value, issued and outstanding, and its surplus as shown by its books and its return to the State Tax Commission of Missouri is $44,601,288.95, and its indebtedness is $6,485,156.20, making a total of $51,086,445.15.

IV. Complainant avers that in the prosecution of its business it owns and operates forty-three shoe factories, of which twenty-four are located in the State of Missouri (two of which are in Jefferson City), nine in the State of Illinois, nine in New Hampshire and one in Kentucky; that the output of its factories is sold by it in intrastate, interstate and foreign commerce; that the value of all of complainant's property and assets employed by it in said business is $97,169,076.24, of which approximately 54 per cent, or $52,956,249.12, is located in the State of Missouri, and approximately 46 per cent, or $44,212,827.12 is located in states other than Missouri.

That the total capacity of complainant's aforesaid factories is approximately 210,000 pairs of shoes per day; that complainant solicits and obtains orders (1) by traveling salesmen or drummers, who go to the customer's place of business and there procure written orders, which are forwarded to complainant's main office in St. Louis, Mis- [fol. 5] souri, or to its offices in New York City, New York; Boston, Massachusetts; Chicago, Illinois, or Manchester, New Hampshire; (2) by printed catalogues and circulars sent to customers through the mails, and (3) by personal presence of customers and their representatives at the offices and sample rooms of complainant in the City of St. Louis, Missouri, and the other cities aforesaid; that the

great bulk of complainant's orders is procured through the solicitation of its traveling salesmen and drummers, who periodically each season call upon the customers at their places of business; that all orders, regardless of how the particular transaction is initiated, are by express terms made subject to approval by complainant at its offices in said cities, and no order is binding upon the complainant until so approved and accepted, and that bills for shoes sold by complainant are payable in said cities.

Complainant avers that under the foregoing method of doing business by far the greater amount of its shoes are sold and shipped in interstate and foreign commerce; that customarily not more than 5¼ per cent of its aggregate annual sales are made to customers in the State of Missouri; that during the year 1927 complainant manufactured in its factories located in the State of Missouri shoes of the value (and which were sold for the amount) of $81,424,270.67, and during the same period it sold to customers in the State of Missouri shoes in the amount and value of $6,535,589.78. During the same period it manufactured in its factories located outside the State of Missouri shoes in the amount and value (and which were sold for the amount) of $42,882,063.16, which it sold and shipped to customers in states other than Missouri and to customers in foreign countries.

Complainant states that, in addition to its qualifying fee paid to the State of Missouri, it has paid annually to the City of St. Louis and other cities in the state and to the State of Missouri its general property taxes upon its real estate and personal property located in said cities and state, and also its manufacturer's and merchant's license taxes. That these taxes paid by it for the year 1927 [fol. 6] amounted to: General property taxes, $69,775.19; manufacturer's license tax, $67,889.15, and merchant's license tax, $59,703.78, an aggregate of $197,386.12.

V. Complainant further avers that in 1917 the General Assembly of the State of Missouri passed an Act known as the Corporation Annual Franchise Tax Act, which was approved by the Governor April 9, 1917, which appears in the Session Laws of Missouri for the year 1917, beginning on page 237; that the sections of this bill were carried forward and appear in the Revised Statutes of Missouri 1919

as sections 9836 to 9848, both inclusive; that in 1921 the General Assembly of the State of Missouri, in extra session, passed, and on August 4, 1921, the Governor approved, an act set forth in the Laws of Missouri, 1921, extra session, beginning on page 121, repealing certain sections of said Corporation Annual Franchise Tax Act and enacting new sections in lieu thereof; that said new sections, with the unrepealed old sections of said act now constitute and are hereinafter referred to as the Corporation Annual Franchise Tax Law of the State of Missouri, and are copied and set forth in appendix A, attached hereto and by this reference thereto are made a part of this bill of complaint as though said sections were herein set forth in extenso, and it is provided by Sections 9836 and 9838 of said Corporation Annual Franchise Tax Law as follows, to-wit:

"Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state shall in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, or, if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall [fol. 7] be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bear to all its property and assets wherever located. Every corporation *not organized under the laws of this state*, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the *par value of its capital stock* and surplus *employed in business in this state*, and for the purpose of this article such corporation shall be deemed to have employed in this state that proportion of its *entire capital stock* and surplus that its property and assets in this state bear to all its property and assets wherever located." (Emphasis ours.)

"Sec. 9838. State Tax Commission to Determine Amount—State Auditor to Make Tax Bills, When—Taxes,

When Due, etc.—The State Tax Commission, or the State Board of Equalization, as the case may be, shall, on or before the 20th day of March in each year, determine from the facts reported, and from any facts within or coming to its knowledge, *the proportion of the capital stock and surplus of each corporation employed in business in this state* and the amount of tax each corporation is liable to pay under the provisions of this article, and shall report the same to the State Auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of May in each year and shall be due and payable to the State Treasurer without notice, who [fol. 8] shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December." (Emphasis ours.)

VI. Complainant avers that conformably with the requirements of Section 9837 of said Corporation Annual Franchise Tax Law and upon the form prescribed therefor by said State Tax Commission of Missouri and within the time prescribed therefor by said section, to-wit, on the 28th day of February, 1928, complainant made its corporation franchise tax report. That said report was signed and sworn to before a notary public by complainant's treasurer.

Complainant states that said report sets forth all of the information called for in said blank and required by said Section 9837 of said Corporation Annual Franchise Tax Law, and to inquiries 4 to 16, inclusive, in said blank and said section 9837 answers were made on behalf of complainant through its treasurer as follows:

4.	Authorized capital stock:		
	Common		4,000,000 shares
	Preferred	$25,000,000.00	
5.	Capital stock subscribed:		
	Common	$36,082,631.00	3,700,000 shares
	Preferred	10,000,000.00	100,000 shares
		$46,082,631.00	
6.	Capital stock issued and outstanding	$46,082,631.00	

7.	Capital stock paid up	46,082,631.09	
8.	Par value of stock:		
	Common	No par value	
	Preferred		$100.00 per shares
8½.	Paid in for each share of non par stock		$9.00

[fol. 9]

9.	Clear value of stock, inclusive of surplus	$90,683,920.04	
10.	Surplus and undivided profits	$44,601,288.95	
11.	Nature and kind of business		Shoe Manufacturing
	(a) Location of all places of business		
	(See schedule attached.)		
12.	Clear market value of property and assets in the State of Missouri	$52,956,249.12	
	(a) Give amount of encumbrance on assets within the State of Missouri	3,534,351.76	
	(b) Give net value of assets in Missouri after deducting encumbrances	49,421,897.36	
13.	Clear market value of property and assets without the State of Missouri	44,212,827.12	
	(a) Give amount of encumbrances on assets without the State of Missouri	2,950,804.44	
	(b) Give net value of assets without Missouri after deducting encumbrances	41,262,022.68	
14.	Clear market value of total property and assets	97,169,076.24	
	(a) Answer to 14 should be the sum total of answers to questions 12 and 13.		
15.	Give total amount of liabilities (do not include capital and surplus)	6,485,156.20	
16.	Change, or changes, if any, in the above particulars made since the last annual report		

And complainant avers that the information contained in said report is true.

It thus appears, and complainant avers the facts to be, that complainant has a total outstanding or paid-in capital stock, or stated capital, of $46,082,631.09, a surplus of $51,086,445.15, total property and assets of the value of $97,169,076.24, of which there are in the State of Missouri $52,956,249.12, or about 54 per cent of its total property and assets.

VII. Complainant states that the State Tax Commission [fol. 10] of Missouri ever since the enactment of the aforesaid sections constituting the Missouri Corporation Annual Franchise Tax Law until now, has construed said sections to require said Commission to determine as the amount of franchise taxes to be paid by each foreign corporation having nonpar stock and doing business in Missouri to be one-twentieth of 1 per cent of the outstanding or paid-in capital stock, or stated capital, and surplus employed by such corporation in its business in this state, and has construed said Section 9836 of said Corporation Annual Franchise Tax Law to mean that such a corporation should be deemed to have employed in its business in this state that proportion of its paid-in or stated capital and surplus that its property and assets is this state bear to all its property and assets, wherever located. That under such construction of said franchise tax laws said Tax Commission has heretofore uniformly determined complainant's annual franchise taxes to be one-twentieth of 1 per cent of so much of its paid-in or stated capital and surplus as was employed by it in this state, and said Tax Commission has uniformly heretofore determined annually that the amount of capital stock and surplus employed by complainant in this state was the same proportion of its total outstanding or paid-in capital stock and surplus that its property and assets in this state bore to all of its property and assets wherever located.

Complainant avers the fact to be and, under the aforesaid construction of said franchise tax laws which said Tax Commission has heretofore held and applied, said Commission would and should have found that complainant employs in its business in this state 54 per cent of its outstanding or paid-in capital stock of $46,082,631.09 and surplus of $51,086,445.15, or $52,956,249.12, and that complainant's franchise tax for the year ending December 31, 1928, is one-twentieth of 1 per cent of said amount, or $26,478.12.

But complainant states that said State Tax Commission accepted as true the information contained in complainant's aforesaid report, and, basing its actions and findings solely upon said information set forth in said report, de- [fol. 11] termined and so reported to the State Auditor of the State of Missouri that complainant's entire capital

stock and surplus are $386,000,000.00; that it has 54 per cent of its property and assets in Missouri; that, therefore, it employs in its business in the State of Missouri 54 per cent of said entire capital stock and surplus, or $208,440,000.00, and that complainant is liable to pay corporation franchise taxes for the year ending December 31, 1928, of one-twentieth of 1 per cent thereof, or $104,220.00.

That said State Tax Commission's figures of $386,000,000.00 as complainant's capital stock and surplus are arbitrary, fanciful and without basis in fact and were arrived at by said Tax Commission by adding to the $10,000,000.00 paid-in preferred stock capital an amount equal to the outstanding 3,760,000 common shares multiplied by $100.00 per share, to-wit, $376,000,000.00, despite the fact that complainant has received for said no-par common stock as paid-in capital stock, but $9.60 per share, or $36,082,631.09.

Complainant states that pursuant to said report made to him by said Tax Commission and as required by the aforesaid section 9838, said State Auditor of the State of Missouri made out a tax bill against complainant for said sum of $104,220.00 and delivered the same to defendant C. Eugene Stephens, State Treasurer of the State of Missouri, for collection from complainant; that in consequence of such determination by said State Tax Commission as aforesaid and of the erroneous and unconstitutional method of computation employed by it, and by virtue of said tax bill so issued against this complainant as aforesaid, defendants claim that complainant is indebted to the State of Missouri on account of its annual franchise taxes for the year 1928 in the total sum of $104,220.00; that defendant Stephens, as State Treasurer, and defendant Shartel, as Attorney General, have made demand upon complainant for the payment of said sum; that complainant offered to pay to said State Treasurer prior to June 1, 1928, the sum of $26,748.12 in [fol. 12] full payment of its franchise taxes for the year ending December 31, 1928, but said offer was refused and said State Treasurer, on June 1, 1928, certified to defendant Attorney General the name of complainant as delinquent in the payment of said taxes and said Attorney General threatens to, and unless restrained by this Honorable Court will, proceed to collect from complainant by suit, as provided in Section 9843 of said Corporation Annual Franchise Tax Law, the said sum of $104,220.00, together with the interest

and penalties provided by said section, to-wit, 1 per cent per month and in addition a penalty of 25 per cent of said taxes, and complainant avers that under the provisions of the aforesaid Section 9842 of said Corporation Annual Franchise Tax Law said franchise tax and said penalties purport to be a first lien on all the property and assets of this complainant within the State of Missouri and constitute a cloud upon the title to all of said property.

VIII. Complainant further avers that said State Tax Commission of Missouri, in computing said taxes, departed from its former uniform practice and its former construction as aforesaid of said Missouri Corporation Annual Franchise Tax Laws, and employed the erroneous and unconstitutional computation hereinabove set forth in consequence of the so-called Stock Corporation Act of the State of Missouri hereinafter referred to and the interpretation thereof by the Supreme Court of Missouri on the 4th day of February, 1928, in the case No. 28,080 in said court of State v. Pierce Petroleum Corporation, reported in volume 2 (2d) Southwestern Reporter, at page 790.

Complainant states that in the year 1921, the General Assembly of the State of Missouri passed a certain bill known as Senate Bill 800, which said act was approved by the Governor of the state on April 12, 1921, and appears in the Sessions Laws of Missouri for the year 1921, beginning on page 661. Said bill will be herein referred to as the Stock Corporation Act. A copy thereof is attached hereto as Appendix B, and by this reference thereto is made a part of this bill of complaint as though set forth herein. The title of said act is as follows:

[fol. 13] "An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporation, and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

That it is provided in and by section 12 of said act as follows:

"Sec. 12. Taxes to be Paid—How Computed.—*For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.* For the purpose of any report, return or similar instrument wherein the amount or par value of stock or capital or capital stock paid in, outstanding or retired is required to be stated, in the case of shares without nominal or par value, and with respect to such shares, the amount or par value thereof, outstanding or paid in prior to the date of such report, return or similar instrument, shall be considered as the amount of stated capital in excess of the total par value of outstanding shares having a par value, if any, and the amount or par value thereof retired shall be considered as the amount [fol. 14] of decrease, if any, of stated capital due to such retirement. In the case of shares without nominal or par value presently to be issued, in lieu of stating the amount or par value thereof in any such certificate, report, return or similar instrument, a description of the consideration received or to be received therefor, or of the assets received or to be received for which the proceeds from the disposition of the said shares are to be used to pay or reimburse the treasury of the company, and the net changes, if any, in the corporations' stated capital, due to the receipt of such consideration, shall be stated. In the case of shares without nominal or par value authorized but unissued and not presently to be issued, it shall not be necessary, in such report, return or similar instrument, to show the amount or par value thereof, and only the number thereof need be stated. For the purpose of any statutory provision limiting the amount of capital stock which a corporation may have, or prescribing the portion or amount or par value of stock or capital which must be subscribed

or paid in cash or otherwise, whether at the time of formation, before commencing to do business, or from time to time subsequent thereto, the stated capital of a corporation having shares without nominal or par value, shall be deemed to be its capital stock or the amount thereof. Nothing in this act contained shall be construed as excepting or relieving a corporation from any requirement of law as to the amount in dollars of subscribed or paid-in capital, in cash or otherwise, which it must have at any time. In any investigation or proceeding to determine the value of the property, assets, or capital stock of a corporation having shares without nominal or par value under the provisions of this act, neither the stated capital of such corporation [fol. 15] nor the number of shares of its outstanding stock without nominal or par value shall be controlling, but the same may be disregarded or considered only to such extent as shall be necessary or proper for the purpose of such investigation or proceeding." (Emphasis ours.)

IX. Complainant states that the Supreme Court of Missouri in said case of State v. Pierce Petroleum Corporation, on the 4th day of February, 1928, construed that portion of said act set forth in the first sentence of section 12 thereof to be in effect a supplement and an amendment to the said Corporation Annual Franchise Tax Law; to divide corporations into two classes, namely: (1) those having a capital stock with shares of a stated par value, and (2) those whose shares are without nominal or par value; and to prescribe a new basis or method of procedure for the ascertainment of the amount of franchise taxes in the cases of both domestic and foreign corporations doing business in Missouri and having outstanding stock without nominal or par value, by requiring that in computing the amount of such franchise taxes to be paid by foreign, as well as domestic, corporations, the State Tax Commission should consider every such share without nominal or par value to be the equivalent of a share having a par value of $100.00, and that its outstanding or paid-in capital or stated capital, with respect to its outstanding nonpar value shares, should be deemed to be an amount equal to the number of such shares multiplied by $100.00 per share.

Complainant respectfully avers:

First. That such construction of said section 12 renders said Stock Corporation Act, and particularly said section 12, as so construed, as an amendment or supplement to said Corporation Annual Franchise Tax Law, violative of Section 23 of Article IV of the Constitution of the State of Missouri, in that the title to said act is misleading, the subject of said act is not clearly expressed in its title and the act contains more than one subject.

As so construed, this act contains the following subjects: (1) The formation, reorganization, merger or con- [fol. 16] solidation of corporations having stock without nominal or par value (for the first time in Missouri), with provisions prescribing regulations of such corporations for the issuance of both preferred and common shares without nominal or par value, the method of determining the number of shares, the payment therefor, the capital, dividends and reports. This subject is clearly expressed in the title: (2) a supplement and amendment to the Corporation Annual Franchise Tax Law of Missouri by prescribing a new method of procedure for the ascertainment of the amount of such taxes to be paid both by domestic and foreign corporations that have stock without nominal or par value—a revolutionary and burdensome amendment, clearly a subject vitally important, different, incongr-ous and wholly unrelated to the preceding subject and hidden away and disguised in section 12. As to this subject there is a sphinx like silence in the title; (3) foreign corporations doing business in Missouri and having stock without nominal or par value. As to them the Corporation Annual Franchise Tax Act, under which continuously since the enactment of said law their franchise taxes have been computed and paid, is supplemented, and a new, revolutionary and burdensome amendment to said Franchise Tax Law is enacted, prescribing a new method for the computation of their franchise taxes, and that, too, without a line, a word or a syllable in the title to suggest that the act has any relation to foreign corporations or franchise taxes. On the contrary, complainant avers that said title is couched in language that restricts its application to domestic corporations therein dealt with, for it

"authorizes corporations * * * to make provision upon formation, reorganization, merger or consolidation for the issue of either or both preferred or common shares without nominal or par value," authority which could be granted by the State of Missouri only to Missouri corporations.

Complainant avers that even if the title to this act were general and related in general terms to domestic stock corporations having stock without nominal or par value, the aforesaid subjects are so separate, distinct and in- [fol. 17] congruous that they could not, under the aforesaid Section 28 of Article IV of the Constitution of the State of Missouri, be joined in the same act. But complainant avers that the title to said act is not general, but "descends to particulars": that these particulars, therefore, stand alone and become the subject of the act. The question is, therefore, not whether the aforesaid supplements to the Franchise Tax Law with respect to domestic corporations and also with respect to foreign corporations fairly relate to a general subject which might have been stated in the title, but the question is whether such subjects fairly relate to and have a natural connection with the subject which is stated in the title, namely, the particulars set forth in the title—which are the subject.

Complainant submits that these subjects, (2) and (3) above, are manifestly dissimilar to the particulars expressed in the title and are not contributory to the accomplishment of the purposes expressed therein, and that the particulars expressed in the title are affirmatively misleading as to any intent to include (2) and (3) above. That in the title (particulars set forth therein) to the Stock Corporation Act under consideration there is no suggestion that said act intends in any respect to supplement and amend the Corporation Annual Franchise Tax Act, or to provide a method for ascertaining franchise taxes as to either domestic or foreign corporations, or to have any relation whatever to franchise taxes.

For the reasons aforesaid, complainant earnestly avers that the aforesaid construction of said section 12 renders said act, particualrly said section 12 as so construed, violative of Setcion 28 of Article IV of the Constitution of

the State of Missouri and void and the said tax bill illegal and void.

Second. The said Stock Corporation Act, with section 12 construed as aforesaid, violates Section 30 of Article 11 of the Constitution of Missouri and section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives complainant and other corpora- [fol. 18] tions similarly situated of their property without due process of law and violates Section 8 of Article 1 of the Constitution of the United States, in that it imposes a burden upon and is a regulation of interstate and foreign commerce.

Construed as aforesaid, franchise taxes are required by said Section 12 of said Stock Corporation Act to be assessed, and complainant's said taxes have been so assessed, upon an arbitrary, exorbitant, confiscatory and purely fictitious valuation and basis, to wit, the valuation of $100.00 per share on issued and outstanding shares of no par common stock, amounting as to complainant to $376,000,000.00, whereas, in fact, as hereinbefore stated, complainant has received for its no-par common shares, or its paid-in capital stock, or capital applicable, under the aforesaid laws of Delaware, to its common shares, only $36,082,631.09. Its total assets in Missouri and elsewhere amount to only $97,169,076.24, and its total assets in Missouri are but $52,956,249.12. Complainant avers that such assessment is not a franchise tax that is based on anything having relation to the purpose for which it is made, and it has no reasonable relation to the value of the privilege for which it is imposed, or to what was paid complainant for said common stock or to its value, or to the actual amount of complainant's capital stock, its property or its business, intrastate or interstate, and that it is not measured by reference to property wholly within the confines of the state. That said tax is in truth and in fact a tax on property neither located nor used in the State of Missouri but is a tax on rights, privileges and property beyond the jurisdiction of the state; that said tax is grossly arbitrary and confiscatory, and, for the reasons and in the particulars aforesaid, deprives complainant of its property without due process of law, in violation of Section 30 of Article 11 of the Constitution of Missouri and of Section 1 of the

Fourteenth Amendment of the Constitution of the United States, and is a burden upon and a regulation of interstate and foreign commerce, in violation of Section 8 of Article 1 of the Constitution of the United States.

[fol. 19] Third. Complainant further avers that all of the rights and privileges and all of the legal incidents which it possesses in connection with its nonpar stock, including the rights of issuance of such stock, liability of its stockholders thereupon, and the practical uses of such stock, it receives, not from the State of Missouri, but from Delaware, the state of its corporation. That complainant received from the State of Missouri and exercises no other or greater or different privileges in Missouri than does a foreign corporation having the same amount of "outstanding" (paid in) capital stock, the same amount of property in Missouri and elsewhere, but a fewer number of issued and outstanding shares with par value. That the franchise taxes with respect to complainant and such foreign corporation can be and are only a charge for identical privileges, namely, the right in corporate form to use in Missouri the identical amount of paid-in capital stock and property in the prosecution of their business; that in neither case does or could the corporation receive from the State of Missouri any rights or privileges with respect to its shares of stock; yet, under the aforesaid construction of section 12, complainant is discriminated against and as a no-par company is taxed for its franchise privileges a sum grossly disproportionate to and greater than the sum that the foreign corporation with par-value shares is taxed for identical privileges, only because complainant possesses certain rights and legal incidents with respect to its nonpar shares which it derives, not from Missouri, but from the state of its incorporation.

That for the reasons and in the particulars aforesaid said Stock Corporation Act by requiring in section 12 thereof, construed as aforesaid, the imposition of such discriminatory franchise taxes, provides an arbitrary classification and discrimination between corporations similarly circumstanced, thereby denying to them the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; im-

posing taxes that are not uniform upon the same class of subjects, in violation of Section 3 of Article X of the [fol. 20] Constitution of Missouri; fails to tax property in proportion to its valuation, in violation of Section 4 of Article X of the Constitution of Missouri; imposes a confiscatory tax upon property and privileges neither located in nor derived from the State of Missouri, thereby depriving complainant and others similarly circumstanced of their property without due process of law, in violation of Section 30 of Article II of the Constitution of Missouri and Section 1 of the Fourteenth Amendment of the Constitution of the United States; and lays a confiscatory and burdensome tax on interstate and foreign commerce, in violation of Section 8 of Article 1 of the Constitution of the United States.

Fourth. Complainant further avers that it received from the State of Missouri and exercises no other or greater or different franchise privileges than does a foreign corporation with non-par-value shares having the same amount of paid-in capital stock and surplus as complainant, the same amount of property in Missouri and elsewhere, but a fewer number of issued and outstanding shares; both have the same amount of capital stock and surplus employed in business in Missouri, and the franchise taxes imposed by the State of Missouri with respect to both such foreign corporations can be and are only a charge for identical privileges, namely, the right in corporate form to use in Missouri the identical amount of paid-in capital stock and property in the prosecution of their business; in neither case does or could either corporation receive from the State of Missouri any rights or privileges with respect to its nonpar shares of stock, and yet, under the aforesaid construction of section 12 complainant is discriminated against by being taxed, in the guise of a franchise tax, a sum grossly disproportionate to and more than is the other foreign nonpar stock corporation with the less number of shares. In consequence whereof the said Stock Corporation Act, by requiring in section 12 thereof, construed as aforesaid, the imposition of such discriminatory so-called [fol. 21] franchise taxes, provides an arbitrary classification and discrimination between complainant and other for-

eign corporations with non-par stock similarly circumstanced, thereby denying to complainant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; imposing taxes that are not uniform upon the same class of subjects, in violation of Section 3 of Article X of the Constitution of Missouri; failing to tax property in proportion to its value, in violation of Section 4 of Article X of the Constitution of Missouri; imposing a confiscatory tax upon property not located in the State of Missouri, thereby depriving complainant and others similarly circumstanced of their property without due process of law, in violation of Section 30 of Article II of the Constitution of Missouri and of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and laying a confiscatory and burdensome tax on interstate and foreign commerce, in violation of Section 8 of Article 1 of the Constitution of the United States.

Fifth. That said Stock Corporation Act, with Section 12 construed as aforesaid, provides a different basis for fixing franchise taxes as between corporations organized under the laws of Missouri, having no-par stock and doing business wholly within the state, and corporations organized under the laws of Missouri, having no-par stock and doing business partly within and partly without said state, thereby denying said corporations the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and imposing upon the same class of subjects taxes that are not uniform, in violation of Section 3 of Article X of the Constitution of Missouri, and imposes a tax upon property not in proportion to its value, in violation of Section 4, Article X of the Constitution of Missouri.

Sixth. That said Stock Corporation Act, with section 12 construed by the Supreme Court of Missouri as aforesaid, provides a different basis for fixing franchise taxes as between corporations organized under the laws of Missouri having par value stock and foreign corporations having [fol. 22] no-par stock, and discriminates against such foreign corporations having no-par stock in favor of domestic corporations having par value stock, thereby denying such

foreign corporations the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, imposes taxes that are not uniform upon the same class of subjects, in violation of Section 3 of Article X of the Constitution of Missouri, and imposes taxes upon property not in proportion to its value, in violation of Section 4 of Article X of the Constitution of the State of Missouri.

Complainant states that by reason of the foregoing considerations Section 12 of said Stock Corporation Act, as construed as aforesaid by the Supreme Court of Missouri, in so far as it relates to the assessment of corporation franchise taxes, is invalid, unconstitutional and void; and complainant avers that the aforesaid tax bill and the franchise taxes represented thereby and the action of said Tax Commission in computing said taxes and of said Auditor in making out said tax bill are illegal, unconstitutional and void in the particulars and for the reasons aforesaid, to-wit: They

(a) Deprive complainant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 30 of Article II of the Constitution of Missouri;

(b) Burden interstate and foreign commerce in violation of Section 8 of Article 1 of the Constitution of the United States.

(c) Violate Section 3 of Article X of the Constitution of Missouri in that said taxes are not uniform.

(d) Violate Section 4 of Article X of the Constitution of Missouri in that complainant's property is not taxed in proportion to its value;

(e) Deny to complainant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and

(f) Said taxes have been assessed under said Corpora- [fol. 23] tion Annual Franchise Tax Law with said Section 12 of said Stock Corporation Act, construed as an amendment or supplement thereto as aforesaid, and said section

as so construed is unconstitutional and void in the particulars and for the reason hereinbefore stated.

X. Complainant avers that under Section 9842 of said Corporation Franchise Tax Law, the taxes and penalties to be paid thereunder are made a first lien on all property and assets of the corporation and that under section 9843 of said law it is made the duty of the defendant State Treasurer to certify to the defendant Attorney-General a list of the corporations which have not paid their franchise taxes on or before the first day of June, and of the defendant Attorney-General to proceed forthwith to sue for and collect the same, together with a penalty of 25 per cent and interest at the rate of 1 per cent per month, and said section makes the judgment rendered in such suit a first lien on all property and assets of the corporation within the State of Missouri; that the aforesaid franchise tax bill for $104,220.00, so unlawfully issued and now in the hands of defendant State Treasurer, purports to be a first lien upon all of the assets and property of complainant in the State of Missouri, and casts a cloud upon the complainant's title to said property, and said State Treasurer has certified to the defendant Attorney-General the name of complainant as being delinquent in the payment of said tax bill and said defendant Attorney-General has demanded of complainant payment of said bill and now threatens to and unless restrained by this Honorable Court will institute suit against the complainant for the collection of such taxes in the sum of $104,220.00, together with a penalty of 25 per cent thereof and interest thereupon at the rate of 1 per cent per month. Complainant avers that its said franchise taxes properly computed under said Corporation Franchise Tax Law should be and are $26,478.12, this amount being one-twentieth of 1 per cent of the amount of complainant's entire capital stock or stated capital and surplus employed by it in business in the State of Missouri and that it has offered to pay said sum to defendant State Treasurer and [fol. 24] Attorney-General in full payment and settlement of its franchise taxes for the year ending the 31st of December, 1928, but that said defendants have refused said offer and complainant avers that unless the said tax bill and the taxes represented thereby and the aforesaid ac-

tion of said State Tax Commission and of said State Auditor are annulled and declared to be unconstitutional and void by this Honorable Court, the same will become binding and conslusive upon complainant and complainant will be compelled to pay said tax so levied, assessed and imposed, together with the aforesaid interest and penalty, notwithstanding that the same is illegal, unlawful and unconstitutional.

XI. Complainant alleges that the State of Missouri cannot be sued and that when moneys are paid to the State Treasurer or to the Attorney-General of the State of Missouri for taxes or franchise taxes there is no remedy provided for the recovery of any such sums, even though they have been illegally collected, and that if complainant should pay said taxes to the defendants, or either of them, it could not recover the same or any part thereof, even though it should make such payment under protest. Complainant avers that it is still ready, willing and able to pay forthwith to the State of Missouri the sum of $26,478.12 in full payment and settlement of its franchise taxes for the year ending the 31st of December, 1928, and that it now again offers said sum to the defendants in full payment of said taxes.

XII. Forasmuch therefore as your complainant is without remedy in the premises except in a court of equity and to the end that it may obtain from this Honorable Court the relief to which it is by equity and in right entitled, it respectfully prays that the above defendants, and each of them, be directed full, true and perfect answer to make to this bill of complaint, but not under oath, answer under oath of each of them being hereby expressly waived, and that Section 12 of said Stock Corporation Act as construed as aforesaid by the Supreme Court of Missouri in so far as it relates to the assessment of corporation franchise taxes be adjudged and decreed invalid, unconstitutional and [fol. 25] void, and that the aforesaid tax bill and the aforesaid franchise taxes represented thereby and the aforesaid action of said State Tax Commission in computing and determining said taxes and of said State Auditor in making out said tax bill be adjudged and decreed to be illegal, unconstitutional and void; that the claimed tax lien against complainant's property be canceled and the cloud on its

property be removed and that said defendants, and each of them, their agents, servants, employes and subordinates and each and every of them be enjoined and restrained from in any manner enforcing or attempting to enforce or causing to be enforced the aforesaid tax bill against complainant and from instituting suit against complainant for the recovery of the aforesaid franchise taxes for the year ending December 31, 1928, interest and penalty, assessed and levied as aforesaid against complainant. And that complainant may have such other and further relief as to the Court may seem equitable in the premises.

Complainant further prays that it be granted a restraining order and interlocutory injunction pending the final hearing and decision of this cause, whereby the said defendants, their agents and servants, subordinates and employes and each and every of them be enjoined and restrained as hereinbefore prayed and that upon final hearing the said interlocutory injunction shall be made perpetual.

Wherefore, complainant prays that writ of subpœna issue herein directed to the above-named defendants and each of them, commanding them on a day certain to appear and answer this bill of complaint.

International Shoe Company, by F. C. Rand, President. Thompson & Thompson, by Guy A. Thompson, James D. Williamson, R. E. Blake, Solicitors for Complainant.

Duly sworn to by F. C. Rand. Jurat omitted in printing.

[fol. 26] [File endorsement omitted.]

[fol. 27] APPENDIX A TO BILL OF COMPLAINT

Corporation Annual Franchise Tax Law

(Rev. St. Mo. 1919, Secs. 9836 to 9848, Incl., as Amended Laws 1921, Ex. Session, pp. 122-126)

Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state, shall, in addition to

all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent. of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent. of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. *Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent. of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located:* Provided, that this law shall not apply to corporations not organized for profit, nor [fol. 28] to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their gross premium receipts in this state: Provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this act. If this provision, exempting bank deposits shall be declared unconstitutional by the courts, then the Legislature hereby declares that it is the intention that the remainder of this act shall be in full force and effect and further declaring that it would have passed this act, irrespective of the said exempting provision. (Laws 1921, Ex. Session, p. 122). (Emphasis ours.)

Sec. 9837. Corporations to Make Report, to Whom—When—To Contain What.—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equaliza-

tion annually on or before the first day of March, in such form as said Commission or said Board of Equalization may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.

2. The location of its principal business office.

3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and post office address of each.

[fol. 29] 4. The amount of authorized capital stock.

5. The amount of capital stock subscribed.

6. The amount of capital stock issued and outstanding.

7. The amount of capital stock paid up.

8. The par value of the stock.

9. The clear market value of the stock.

10. The amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.

11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.

12. The clear market value of its property and assets in this state.

13. The clear market value of its property and assets without this state.

14. The clear market value of its total property and assets.

15. The amount of liabilities.

16. The change or changes, if any, in the above particulars made since the last annual report (Laws 1921, Ex. Session, page 123).

Sec. 9838. State Tax Commission to Determine Amount —State Auditor to Make Tax Bills, When—Taxes, When Due, etc.—The State Tax Commission, or the State Board of Equalization, as the case may be, shall, on or before the 20th day of March in each year, determine from the facts reported, and from any facts within or coming to its knowledge the proportion of the capital stock and surplus of each corporation employed in business in this state and the amount of tax each corporation is liable to pay under the provision of this article and shall report the same to the State Auditor, who shall make out a tax bill therefor [fol. 30] against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of May in each year and shall be due and payable to the State Treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December (Laws 1921, Ex. Session, page 123).

Sec. 9839. Written Reports, Who Shall Make, etc.—Every corporation organized under the laws of this state and every foreign corporation engaged in business in this state and having no capital stock shall make a report in writing to the Missouri Tax Commission, or if it is not in existence, to the State Board of Equalization, annually, on or before the 1st day of March, in such form as said Commission or said Board of Equalization may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice-president, secretary, treasurer, or other chief officer of the corporation, and forwarded to said Commission or said State Board of Equalization as the case may be: Provided, that all state, district, county, town and farmers' mutual companies now organized or that may be hereafter organized under any of the laws of this state, organized for the sole purpose of writing fire, lightning, windstorm, tornado, cyclone, hail and plate glass and mutual automobile insurance and for the purpose of paying any loss incurred by any member by assessment, shall not be required to make [fol. 31] reports and shall be exempt from all the provisions

of this section and article and shall not be required to pay any fees as in this article provided (Laws 1921, Ex. Session, page 124).

Sec. 9840. Information Reports Shall Contain.—Such report so made shall contain the following:

1. The name of the corporation.

2. The location of its principal office.

3. The names of the president, vice-president, secretary, treasurer and members of the board of directors, with the post-office address of each.

4. The date of annual election of officers.

5. The nature of the business in which said corporation is engaged (Laws 1921, Ex. Session, page 124).

Sec. 9841. State Tax Commission—Duties—Annual Fees.—Upon the filing of the report provided for in Sections 9839 and 9840 of this article, said Commission or said State Board of Equalization, as the case may be, shall report to the State Auditor on or before the 20th day of March of every year, who shall charge and certify to the State Treasurer on or before August 1st of every year for collection as herein provided, a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having a capital stock, or any other corporation not organized strictly for religious, charitable or educational purposes and having no capital stock or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased mem-[fol. 32] ber thereof. All foreign life, fire, accident, surety, liability, steam boiler, tornado, health, or other kind of insurance company of whatever nature coming within the provisions of section 9839 and 9840 and doing business in this state having an outstanding capital stock of less than five hundred thousand dollars ($500,000) shall pay an annual fee of fifty dollars ($50.00) and all other such insurance companies having a capital stock of more than five hundred thousand dollars ($500,000) an annual fee of one

hundred dollars ($100.00) for the privilege of doing business in this state, and all building and loan associations to pay an annual fee to the state of twenty-five dollars ($25.00) for the privilege of doing business in this state in place of the fee based on the capital stock and surplus as hereinbefore provided (Laws 1921, Ex. Session, p. 125).

Sec. 9842. Taxes, to Be a Lien.—The taxes and penalties to be paid by the provisions of this article shall be a first lien on all property and assets of the corporation within this state (Laws 1917, p. 237).

Sec. 9843. Delinquents—How Collected—Penalty.—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this article on or before the first day of June the State Treasurer shall certify a list of such corporations so delinquent to the Attorney-General, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent. and interest at the rate of one per cent. per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all property and assets of the corporation within this state (Laws 1921, Ex. Session, p. 125).

[fol. 33] Sec. 9844. Failure to Make Report, Prosecuting Attorney to Bring Action, etc.—If any corporation subject to the provisions of this article shall fail or neglect to make the report herein required, or within the time herein required, such corporation, if organized under the laws of this state, shall forfeit its charter, or, if a foreign corporation, shall forfeit its right to engage in business in this state, and the Attorney General, or at his direction, the Prosecuting Attorney of the county in which such corporation has its principal business office, shall bring an action in the name of the state in some court of competent jurisdiction to annul the charter or revoke the license of such corporation to engage in business in this state (Laws 1917, p. 237).

Sec. 9845. Value of Property—Not to Be Set Out in Report—When.—All insurance companies, building and loan associations, and other corporations, the fees of which are

fixed at lump sums by this article, and all corporations which employ all their property and all their outstanding capital stock in this state, or which will report and pay the fees on all of its outstanding capital stock, whether employed in this state or not, shall not be required to set out in the report required by this article the value of its property within this state or without the state (Laws 1921, Ex. Session, p. 126).

Sec. 9846. Board May Summon Witnesses, Take Testimony, etc., When.—If any corporation subject to the provisions of this article fails or refuses to make full and complete answers to the questions contained in the report required to be filed by it, or if the Tax Commissioner or State Board of Equalization, as the case may be, finds that any answer or answers contained in said report are untrue, or [fol. 34] if said Tax Commission or State Board of Equalization, as the case may be, has reason to believe and does believe that any corporation has made a false statement or concealed any fact or facts which are material in determining the amount of tax for which such corporation is liable or ought to be liable under the provisions of this article, then said Commissioners may require the delinquent corporation, its officers, agents or employes to furnish information concerning their capital stock which is necessary in determining the amount of tax to be paid by them, and for that purpose said Commission or said State Board of Equalization, as the case may be, may summon witnesses to appear and give testimony and to produce records, books, papers, documents, and all other information of any kind or character required relating to any matter necessary to be ascertained for the purpose of arriving at the amount of such tax to be paid. The witnesses may be summoned by subpœna issued by any member of such Commission or the secretary thereof, in the name of the Commission, if such Commission be in existence, in the name of such board, directed to the sheriff of any county in the state and returnable to said Commission or said State Board of Equalization, as the case may be, which subpœna shall be served in like manner and the same effect and under similar conditions as if issued out of the Circuit Court. Such Commission or the State Board of Equalization, as the case may

be, is also authorized to take depositions of witnesses residing within or without the state or absent therefrom, to be taken upon notice to the interested parties, if any, in like manner that depositions of witnesses are taken in civil cases [fol. 35] in the Circuit Court in any matter which the Commission may have authority to investigate and determine. Oaths of witnesses in any matter under investigation or consideration of such Commission or State Board of Equalization, as the case may be, may be administered by the secretary or any member of such Commission or the State Board of Equalization, as the case may be. In case any witness shall fail to obey any subpœna or summons to appear before said Commission or shall refuse to testify or answer any material questions and to produce records, books, papers or documents when required so to do, such failure or refusal shall be reported to the Attorney-General, who shall thereupon proceed in the proper course to compel obedience to any subpœna or summons or proper order of the Commission or State Board of Equalization, as the case may be, and said Commission or Board may punish witnesses for any improper neglect or refusal (Laws 1917, p. 237).

Sec. 9847. Powers of Commission, etc.—Said Commission or said State Board of Equalization, as the case may be, shall have power to appoint a commissioner to take testimony in any proceeding or inquiry arising under the provisions of this article, and such commissioner may take testimony within or without the state and have all the power evidence so taken to the Commission or Board of Equaliza- to compel witnesses to appear and give testimony and to produce records, books, papers, documents or other evidence; such commissioner shall return all testimony and evidence so taken to the Commission or Board of Equalization and shall be allowed a reasonable compensation and expenses, including stenographic fees. Any witness who [fol. 36] shall knowingly or willfully give false answers to any questions propounded in any such sworn examination where the fact inquired of is within his knowledge shall be deemed guilty of perjury. It shall be unlawful for any member of the Missouri Tax Commission or any member of the State Board of Equalization, as the case may be, or for any officer or employee of such Commission or such State Board

of Equalization, as the case may be, or for any other officer or employe of the state to divulge or make known in any manner whatever not provided by law to any person, any information obtained by them in the discharge of their official duties; or to divulge or make known in any manner not provided by law any document reviewed or evidence taken or report made under this article. Any offense against the foregoing provisions shall be a misdemeanor and shall be punished by a fine of not exceeding one thousand dollars ($1,000.00), or by imprisonment in the county jail not exceeding six months (Laws 1917, p. 237).

Sec. 9848. Failure of Commission—State Board of Equalization to Act.—In the event that the State Tax Commission is not created or in existence all the powers and duties of such Commission under the provisions of this article shall devolve upon and be exercised and performed by the State Board of Equalization, and in such event the State Board of Equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this law (Laws 1917, p. 237).

[fol. 37] Appendix B to Bill of Complaint

Stock Corporation Act

(Laws Mo. 1921, pp. 661-666)

An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger, or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner.

Section 1. Stock Corporations Other Than Building and Loan Associations, Trust Companies, etc.—Shares, par Value—Capital.—Upon the formation or reorganization,

under the laws of this state from time to time in force, of any stock corporation, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, or upon the merger or consolidation of two or more such corporations of this state with each other or any one or more of such corporations of this state with one or more such corporations of another state or states or of the United States, provision may be made for the issue of shares of preferred stock of any or all classes, or common stock of any class, or both preferred and common stock, without any nominal or par value, by stating in the articles of association or certificate of incorporation or reorganization or in the joint agreement of merger or consolidation, in lieu [fol. 38] of statements which may be prescribed by law as to the amount of the capital stock and the number and par value of shares into which it is divided:

(a) The number of shares with nominal or par value, and the number of shares without nominal or par value, that may be issued by the corporation, and the classes, if any, into which such shares are divided;

(b) The nominal or par value of shares of stock other than shares which is it stated are to have no nominal or par value;

(c) The amount of capital with which the corporation will begin business.

Sec. 2. Amount of Capital Stock Shall be Fully Paid in.—No corporation authorized to issue shares of stock without nominal or par value in pursuance of the provisions of this act shall begin to carry on business or shall incur any indebtedness, until the amount of the capital with which it will begin business stated in pursuance of section 1 of this act, shall have been fully paid in cash or in property.

Sec. 3. Stated Capital Shall not Include net Profits or Surplus Earnings.—For the purposes of this act the stated capital (as that term is hereinafter used in this act) of a corporation issuing shares without nominal or par value shall be the capital with which the corporation will begin business increased by any net additions thereto, or diminished by any net deductions therefrom: but stated capital

shall not include any net profits or surplus earnings until transferred to capital, and shall not be larger in amount than the excess, as shown by the books of the corporation, of its assets over and above its liabilities, other than liabilities on account of shares of stock issued or to be issued by [fol. 39] such corporation. In the case of a corporation having outstanding shares with a nominal or par value, as well as shares without a nominal or par value, for the purpose of this act the portion of stated capital applicable to the shares without a nominal or par value shall be the excess of stated capital over and above the total par value of outstanding shares having a nominal or par value.

Sec. 4. May be Stated in Dollars or Cents per Share.—Preferences, rights, limitations, privileges, and restrictions may be stated in dollars or cents per share in respect to shares of stock issued in pursuance of the provisions of this act.

Sec. 5. Authorized Shares May be Issued, When.—Such corporation may issue and may dispose of its authorized shares having no nominal or par value, from time to time, for such consideration as may be prescribed or authorized in the articles of association or certificate of incorporation or reorganization or the joint agreement of merger or consolidation, or, if not so prescribed, then for such consideration as may be fixed by the stockholders of such corporation at any annual meeting thereof or at any special meeting thereof duly called and held or by the board of directors acting under authority of such stockholders given in like manner.

Sec. 6. Shares Shall be Deemed Fully Paid and Non-assessable.—Any and all shares without nominal or par value, issued for the consideration as prescribed or fixed in accordance with the provisions of section 5 of this act, shall be deemed fully paid and be non-assessable, and the holder of such shares shall not be liable thereon to the corporation or to its creditors.

[fol. 40] Sec. 7. Certificate Shall Plainly State, What.—Every certificate for shares of stock without any nominal or par value shall have plainly stated upon its face the

number of shares which it represents, and no certificate shall express any par value for such shares or any rate of dividend to which such shares shall be entitled in terms or percentage of any par or other value.

Sec. 8. Dividends to be Paid Out of Net Profits and Surplus Earnings.—No corporation having shares without nominal or par value, issued under the provisions of this act, shall declare or pay any dividend out of capital or out of anything except net profits or surplus earnings. In case any such dividends shall be declared or paid other than from net profits or surplus earnings, the directors voting for such dividend shall be liable, jointly and severally, to such corporation, and to the creditors thereof, to the full amount by which such dividend shall have been paid out of capital.

Sec. 9. Par Value of Shares to be Stated.—In any case in which it is otherwise required by law that the par value of the shares of a corporation be stated, but the shares of such corporation of any class are without nominal or par value, there shall be stated in lieu thereof in respect of such shares that such shares of such class are without par value; and when in any case the maximum or minimum amount of the capital stock of a corporation and its division into shares is required to be stated, but the shares of such corporation or any class are without nominal or par value, there shall be stated in lieu thereof the maximum or minimum amount of the capital stock of the corporation represented by shares having a par value and the division thereof [fol. 41] into shares and the maximum and minimum number of shares without nominal or par value and that such shares are without par value. In any case, in which it is required by law that any action on the part of a corporation may be taken only with the authorization, consent or approval of its stockholders holding a specified amount or a specific fraction in amount of its capital stock, a share without nominal or par value shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.

Sec. 10. Corporation May Increase or Reduce Number of Shares.—Any corporation having shares without any nominal or par value in pursuance of this act, may increase or

reduce the number of shares which it may issue, in the manner now provided by law for the increase or reduction of the capital stock of a similar corporation having shares with a par value.

Sec. 11. Shares of Stock to be Deemed Part of Aggregate Capital of Corporation.—Except as to any preferences, rights, limitations, privileges and restrictions, lawfully granted or imposed with respect to any stock or class thereof, shares of stock without nominal or par value shall be deemed to be an aliquot part of the aggregate capital of the corporation issuing the same and equal to every other share of stock of the same class.

Sec. 12. Taxes to be Paid—How Computed.—*For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof and for the purpose of* [fol. 42] *any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.* For the purpose of any report, return, or similar instrument wherein the amount or par value of stock or capital or capital stock, paid in, outstanding, or retired, is required to be stated, in the case of shares without nominal or par value, and with respect to such shares, the amount or par value thereof, outstanding or paid in prior to the date of such report, return or similar instrument, shall be considered as the amount of stated capital in excess of the total par value of outstanding shares having a par value, if any, and the amount or par value thereof retired shall be considered as the amount of decrease, if any, of stated capital due to such retirement. In the case of shares without nominal or par value presently to be issued, in lieu of stating the amount or par value thereof in any such certificate, report, return, or similar instrument, a description of the consideration received or to be received therefor, or of the assets received or to be received for which the

proceeds from the disposition of the said shares are to be used to pay or reimburse the treasury of the company, and the net changes, if any, in the corporations' stated capital, due to the receipt of such consideration, shall be stated. In the case of shares without nominal or par value authorized but unissued and not presently to be issued, it shall not be necessary, in such report, return, or similar instrument, to show the amount or par value thereof, and only the num-
[fol. 43] ber thereof need be stated. For the purpose of any statutory provision limiting the amount of capital stock which a corporation may have, or prescribing the portion or amount or par value of stock or capital which must be subscribed or paid in cash or otherwise, whether at the time of formation, before commencing to do business, or from time to time subsequent thereto, the stated capital of a corporation having shares without nominal or par value, shall be deemed to be its capital stock or the amount thereof. Nothing in this act contained shall be construed as excepting or relieving a corporation from any requirement of law as to the amount in dollars of subscribed or paid-in capital, in cash or otherwise, which it must have at any time. In any investigation or proceeding to determine the value of the property, assets, or capital stock of a corporation having shares without nominal or par value under the provisions of this act, neither the stated capital of such corporation nor the number of shares of its outstanding stock without nominal or par value shall be controlling, but the same may be disregarded, or considered only to such extent as shall be necessary or proper for the purpose of such investigation or proceeding. (Emphasis ours.)

Sec. 13. Laws Applicable to Corporation Provided by Act.—Except as otherwise provided by this act, corporations issuing shares without any nominal or par value, under the provisions hereof, shall be and remain subject to the laws of this state, now or hereafter in force, relating to the formation, regulation, reorganization, consolidation, or merger, rights, powers, and privileges of such corporations, and all other laws applicable thereto.

[fol. 44] Sec. 14. Acts or Parts of Acts Inconsistent Repealed.—All acts or parts of acts providing for the incor-

poration, organization, administration and management of the affairs of corporations or otherwise, and inconsistent with this act, are, as respects corporations having shares without nominal or par value, hereby repealed, but all such acts or parts of acts are in all other respects, as respects corporations having shares without nominal or par value, expressly continued in full force and effect.

Sec. 15. Act Does Not Limit Jurisdiction of Public Service Commission.—Nothing in this act shall be construed in any way to limit the jurisdiction of the Public Service Commission under the Public Service Commission Act over the issue by public utilities of shares of stock without nominal or par value pursuant to this act.

Approved April 12, 1921.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION THAT DEFENDANTS WILL NOT ENFORCE OR ATTEMPT TO ENFORCE AGAINST COMPLAINANT THE FRANCHISE TAX BILL—Filed July 9, 1928

The defendants in the above entitled cause, Stratton Shartel, Attorney-General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, stipulate and agreee with the complainant in said cause, International Shoe Company, that the said defendants will not take any steps to enforce or attempt to enforce or to cause to be enforced against complainant the franchise tax bill mentioned in the bill of complaint in the aforesaid cause, and will not institute any suit against complainant for the recovery of the said franchise taxes, pending the hearing and determination in the United States District Court upon the application of the said complainant for an interlocutory injunction or pending the hearing on appeal from the order of said Court granting

or denying said preliminary injunction, the giving of any bond by complainant being expressly waived.

Stratton Shartel, Attorney General of the State of Missouri; C. Eugene Stephens, State Treasurer of the State of Missouri, by Stratton Shartel, Their Solicitors, by W. E. Sloat, Spec. Asst. Atty. Genl. International Shoe Company, by Guy A. Thompson, Its Solicitor.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF FILING OF ORDER TO SHOW CAUSE, ETC.—July 16, 1928

Now on this day comes the plaintiff by its solicitors, and files an Order to Show Cause, and Order for issuance of Subpoena; thereupon in pursuance to said order, a subpoena is issued against said defendants commanding them to be and appear before this court, as provided by the Equity rules.

IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE WHY INTERLOCUTORY INJUNCTION SHOULD NOT BE GRANTED AND ORDER FOR ISSUANCE OF SUBPOENA IN CHANCERY—Filed July 16, 1928—and MARSHAL'S RETURN

Whereas in the above entitled cause it has been made to appear upon the bill of complaint filed herein that an interlocutory injunction, preliminary to a final hearing, is proper and that prima facie the complainant is entitled thereto, enjoining the defendants from in any manner enforcing or attempting to enforce or causing to be enforced against the complainant the tax bill for complainant's Corporation Franchise Taxes for the year ending December 31, 1928, mentioned in said bill of complaint, and from in-

[fol. 47] stituting suit against complainant for the recovery of said franchise taxes, interest and penalty,

Now, it is ordered that the said defendants, Stratton Shartel, Attorney-General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, appear in the District Court of the United States, Central Division, Western Judicial District of the State of Missouri, on the 12th day of October, 1928, at the hour of 9:30 o'clock A. M., at the Federal Building in the city of Jefferson City, Missouri, in the court room of said Court, before the Judges then and there sitting to hear the application for said interlocutory injunction contained in the bill of complaint herein, and then and there show cause, if any they have, to the Judges then sitting to hear and determine said application, why the interlocutory injunction asked for in said bill of complaint should not be granted.

It is further ordered that a Subpœna in Chancery be forthwith issued, directed to the Marshal of the District Court of the United States for the Western Judicial District of Missouri, requiring defendants Stratton Shartel, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, to appear and answer the bill of complaint of the complainant herein; and also that the said Marshal be and he is hereby directed forthwith to serve the said defendants and Sam A. Baker, Governor of the State of Missouri, with a copy of this order, certified under the hand of the Clerk and the seal of this Court.

Dated at St. Joseph, Mo., this 12th day of July, 1928.

Merrill E. Otis, Judge of the United States District Court for the Central Division, Western Judicial District of Missouri.

[File endorsement omitted.]

[fol. 48] Return of Marshal on Order to Show Cause

United States of America
Central Division of the
Western District of Missouri, set:

I hereby certify that I executed this writ by leaving a copy of the same at the office of the Attorney General with

his chief Clerk, to-wit: Margaret Zietz, the Attorney General was absent from Cole County at the time of said service. I further executed this writ by leaving a copy of the same at the office of the State Treasurer of the State of Missouri, with the Chief Clerk, to-wit: Paul W. McCall, the Treasurer of the State of Misouri being absent from Colt County at the time of said service. I further executed this writ by leaving a copy of the same at the office of the Governor of the State of Missouri with his Secretary, to-wit, Martha Godsey, the Governor being absent from Cole County at the time of said service.

All done in Cole County in said Division and District this 16 day of July, 1928.

Asa W. Butler, U. S Marshal, by Anton B. Richter, Deputy.

Marshal's fees: 3 services, $6.00.

Returned to the Clerk's office and filed July 20, 1928.

[fol. 49] IN UNITED STATES DISTRICT COURT

SUBPOENA IN CHANCERY, WITH RETURN OF MARSHAL.—Filed July 21, 1928

UNITED STATES OF AMERICA
Central Division of the
Western District of Missouri, set:

The President of the United States of America to Stratton Shartel, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, greeting:

You Are Hereby Commanded to be and appear at the office of the Clerk of the District Court of the United States, for the Central Division of the Western District of Missouri, on the 12th day of October, 1928, at Jefferson City, Missouri, then and there to answer the bill of complaint of International Shoe Company, a corporation, citizen of the State of Delaware, filed against you on the 9th day of July, A. D. 1928; hence fail not.

Witness the Honorable Merrill E. Otis, Judge of the United States District Court for the Western District of Missouri, the 16th day of July, 1928.

Issued at office in Jefferson City, Missouri, in said District, under the seal of said Court, the day and year last aforesaid.

Edwin R. Durham, Clerk of said District Court, by F. J. Fromme, Deputy Clerk. (Seal.)

Memorandum.—The defendants are required to file their answer or other defense in the Clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Edwin R. Durham, Clerk, by F. J. Fromme, Deputy Clerk. (Seal.)

United States of America
Central Division of the
Western District of Missouri, set:

I do hereby certify that I executed this writ by leaving a copy of the same at the office of the Attorney General of [fol. 50] the State of Missouri with the Chief Clerk, to-wit: Margaret Zietz, the Attorney General of the State of Missouri was absent from Cole County at the time of said service. I further executed this writ by leaving a copy of the same at the office of the State Treasurer of the State of Missouri, with the Chief Clerk, to-wit: Paul W. McCall, the Treasurer of the State of Missouri was absent from Cole County at the time of said service. All done in Cole County in said Division and District this 16th day of July, 1928.

Asa W. Butler, U. S. Marshal, Western District of Missouri, by Anton B. Richter, Deputy.

In United States District Court

[Title omitted]

Minute Entry of Filing of Answer—Aug. 3, 1928

Now on this day come the defendants by their attorneys, and file their joint answer to the bill of complaint.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 51] ANSWER—Filed Aug. 3, 1928

Come now the defendants Stratton Shartel, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, and for their answer to the bill of complaint filed in the above entitled cause say:

I

Defendants admit that the complainant, International Shoe Company, is a duly organized corporation, organized under the laws of the State of Delaware, and that said corporation is duly licensed and qualified to do business in the State of Missouri; that complainant has maintained its principal business office in the city of St. Louis, Missouri; that defendant Stratton Shartel is the duly qualified and acting Attorney General of the State of Missouri, and as such is charged with the duty of enforcing payment to said state of corporation franchise taxes reported delinquent to him by the State Treasurer; that defendant C. Eugene Stephens is the duly elected, qualified and acting State Treasurer of the State of Missouri, and as such is charged with the duty of collecting the corporation franchise taxes ascertained, levied and assessed under the laws of the State of Missouri, and of certifying to the Attorney General of the State of Missouri the list of corporations delinquent in the payment of the franchise tax; that complainant by reason of its incorporation under the laws of Delaware, is a citizen and resident of the State of Delaware, and that defendants are bona-fide citizens of the State of Missouri, residing in the city of Jefferson City, County of Cole, State of Missouri, Central Division of the Western Judicial District.

II

Defendants further answering admit that this is a civil suit wherein the matter of controversy exceeds the sum of $3,000 exclusive of interest and costs.

[fol. 52]

III

Defendants further answering admit that complainant corporation is incorporated under the laws of the State of Delaware and is authorized to issue an aggregate of 4,250,000 shares of stock, of which 250,000 were to be preferred shares of the value of $100.00 each, amounting in the aggregate to $25,000,000, and that 4,000,000 shares were authorized to be issued without nominal or par value; that there are now outstanding 100,000 shares of preferred stock at the par value of $100.00 per share making an aggregate of outstanding par stock of $10,000,000; that there are now outstanding 3,760,000 shares of the 4,000,000 shares which were authorized to be issued without nominal or par value.

IV

Defendants further answering admit that complainant operates shoe factories in various parts of the United States, and that only approximately 54% of its property and assets is employed within the State of Missouri.

V

Defendants further answering admit that in 1917 the General Assembly of the State of Missouri passed an act known as the Corporation Annual Franchise Tax Act, and that in 1921 the General Assembly of the State of Missouri in extra session passed an act set forth in the laws of Missouri, 1921, extra session, beginning on page 121, repealing certain sections of said Corporation Annual Franchise Tax Act, and enacting new sections in lieu thereof, and that said new sections, with the unrepealed old sections of said act, now constitute the corporation annual franchise tax law of the State of Missouri.

VI

Defendants further answering admit that complainant made its corporation franchise tax report, which is required to be made under the law, in due time, said report having been signed and sworn to by complainant's treasurer. Defendants further admit that said report of complainant cor-

[fol. 53] poration shows total property and assets of the value of $97,169,076.24, of which complainant admits approximately 54% or $52,956,249.12 of said property and assets is located within the State of Missouri.

VII

Defendants further answering admit that the franchise taxes of corporations having stock of no-par value were not figured the same for the year 1928 as they had formerly been figured by the State Tax Commission. Defendants admit that in 1928, the state law of Missouri which governs corporations with no-par stock, which law is found at page 661, Laws of Missouri, 1921, was used in arriving at the franchise tax, said law having been recently construed by the Supreme Court of Missouri in the case of State vs. Pierce Petroleum Corporation, 2 S. W. 2nd Series, 790. Defendants further state, however, that since the above mentioned decision of the Supreme Court of the State of Missouri, all corporations doing business within this state, and having stock of no-par value, have been assessed at the same rate per share on all stock of no-par value for the purposes of assessing the franchise tax.

Defendants further admit that all outstanding stock of complainant corporation with no-par value was assessed for the 1928 franchise tax at $100.00 per share, which assessment made the tax of said complainant corporation due the State of Missouri for 1928 amount to $104,220.00. Defendants further admit complainant corporation has offered to pay to said State Treasurer prior to June 1, 1928, the sum of $26,478.12 in full payment of its franchise tax for 1928; that said amount has been refused by the State Treasurer, and that on June 1, 1928, said defendant, State Treasurer, certified to defendant Attorney General, the name of complainant corporation as delinquent in the payment of said taxes.

VIII

Defendants further answering admit that the State Tax [fol. 54] Commission in computing the franchise taxes against said complainant corporation for the year 1928 departed from the former practice of assessing no-par

stock, but defendants deny that the method employed is erroneous and unconstitutional.

Defendants admit that in the year 1921 the General Assembly of the State of Missouri passed an act governing corporations with no-par stock, and admit that the title to this act is the same as that set out at page 15 of complainant's bill, and that Section 12 of said act, under which the capital of the corporation is ascertained, is the same as set out at page 15 of complainant's bill.

IX

Defendants further answering admit that parts of this law were construed by the Supreme Court of Missouri in the case of State v. Pierce Petroleum Corporation, said Pierce Petroleum Corporation having been a foreign corporation incorporated in the same state as is complainant corporation.

(1) Defendants, however, deny that the title to said act is unconstitutional, for the reason that this act is used only to arrive at the capital of a corporation, the tax then being assessed under the State Franchise Act. Defendants further state that the title to this act specifically provides a method of "determining the number of shares and capital of corporations issuing shares in such a manner." Defendants aver that this is the only use made of this act, and that the franchise tax is not assessed under this act, but that it is used merely to arrive at the capital stock of a corporation.

(2) Defendants deny that said law imposes a burden upon or is a regulation of interstate and foreign commerce, it being assessed only against the proportionate shares of a corporation's outstanding capital stock which is employed within the State of Missouri, and aver that it is not a tax on rights, privileges and property beyond the jurisdiction of the State of Missouri, nor is it arbitrary and confiscatory.

[fol. 55] (3) Defendants deny that this tax is an arbitrary classification and discrimination between corporations similarly circumstanced, and aver that all corporations, foreign and domestic, are treated alike under this statute.

(4) Defendants deny that Section 12 of said stock corporation act as construed by the Supreme Court of the State of Missouri, provides an arbitrary classification and discrimination between complainant and other foreign corporations with no-par stock similarly circumstanced, thereby denying the complainant the equal protection of the law.

(5) Defendants deny that the construction of Section 12 of the stock corporation act provides a different basis for fixing franchise taxes as between corporations organized under the laws of Missouri, having no-par stock and doing business only within the state, and of corporations organized under the laws of Missouri having no-par stock and doing business partly within, and partly without said state.

(6) Defendants deny that any difference is made in assessing the state franchise tax of domestic corporations and of foreign corporations having stock of no-par value.

X

Defendants admit that the taxes and penalties accruing under the franchise tax act becomes a first lien on all property and assets of a corporation.

XI

Defendants admit that taxes once paid to the State of Missouri cannot be remitted except by a special act of the state legislature.

XII

Defendants further answering aver that the state franchise tax law and the stock corporation act of Missouri, are both constitutional and have been so declared by the [fol. 56] Supreme Court of the State of Missouri, and that the tax against complainant corporation has been fairly assessed and is now due and owing to the State of Missouri.

Wherefore defendants, having fully answered, pray that the relief asked for in complainant's bill of complaint be

denied, and for such other and further relief as the defendants may in equity and good conscience be deemed by the court entitled to.

Stratton Shartel, Attorney General; W. E. Sloat, Special Assistant Attorney Gen'l, Solicitors for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF ORDER TRANSFERRING CAUSE, ETC.

[Titles omitted]

October 18, 1928.

It is ordered by the Court that this case be and the same is hereby transferred to the Western Division of the Western District of Missouri, for trial only, before three judges.

Oct. 23, 1928.

The parties hereto appearing by their respective counsel, a hearing is proceeded with, before Hon. Kimbrough Stone, Circuit Judge, Hon. Albert L. Reeves and Hon. Merrill E. Otis, District Judges, and counsel having completed their arguments, the application for a temporary injunction is denied.

[fol. 57]

Nov. 2, 1928.

Now on this day is filed the Opinion of Court and an Order denying application for temporary injunction.

[fol. 58] IN UNITED STATES DISTRICT COURT

In Equity. No. 223

INTERNATIONAL SHOE COMPANY, a Corporation, Complainant,

vs.

STRATTON SHARTEL, Attorney-general of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, Defendants

Before Stone, Circuit Judge, and Reeves and Otis, District Judges

REEVES, District Judge, delivered the opinion of the Court.

OPINION—Filed Nov. 2, 1928

Complainant, a corporation of Delaware but doing business under a license in the State of Missouri, seeks by this proceeding to restrain proper officials of the State of Missouri from levying and collecting certain franchise taxes. Such taxes are imposed by operation of law. Complainant questions the constitutionality of the Corporation Annual Franchise Tax Law of said state. This challenge is made because of the decision of the Supreme Court of Missouri in State v. Petroleum Corporation, 2 S. W. 2d Series 790. It was held in that case that Section 12 of the Stock Corporation Act amended the Franchise Tax Law.

The Annual Franchise Tax Law of Missouri, so far as pertinent here, provides, among other things, that

[fol. 59] "Every corporation not organized under the laws of the State, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent. of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

Domestic corporations were subject to the same rule. Subsequently there was enacted the Stock Corporation Law. This provided, among other things, for the issuance of shares of stock without nominal or par value. Previously no such provision had been made under the Missouri law. Section 12 of said Act reads as follows:

"For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of one hundred dollars."

By the decision in the Pierce Petroleum case, supra, the above provision was made applicable in computing the franchise tax on all corporations, both domestic and foreign.

The complainant has gross assets in the aggregate of $97,169,076.24. Its assets located in the State of Missouri are of the market value of $52,956,249.12. Aside from its preferred stock issued and outstanding with a stipulated par value, it has issued and outstanding 3,760,000 shares of stock without nominal or par value.

[fol. 60] As stated, the Supreme Court of Missouri, in Pierce Petroleum, supra, held in substance that the mode of computing values under the Franchise Tax Law should be that prescribed by said Section 12. The taxing authorities accordingly applied the valuation thus fixed by statute to complainant's stock and made the computation prescribed by said Section 12. This gave complainant's issued shares, without nominal or par value, a valuation of $376,000,000. The formula so employed raised complainant's franchise tax from approximately $25,000 under former computations to a sum in excess of $100,000.

Complainant asserts variously that it is deprived of its property without due process of law; that its interstate commerce is unduly burdened; that there is an absence of uniformity; that there is no lawful proportion as to value

and that it has been denied the equal protection of the law.

1. All of the above questions, save as to the effect on interstate commerce, were settled in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, and numerous other decisions.

2. The remaining question is to determine whether the tax places such a burden upon interstate commerce as to warrant interference by this court. As postulates to the consideration of this question, the following principles may be assumed:

"The state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the state.'" (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, l. c. 26 and 27; Postal Telegraph Co. v. Adams, 155 U. S. 688, l. c. 696; Leloup v. Mobile, 127 U. S. 640, l. c. 649.)

[fol. 61] The federal court "must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the States and precluding temporary federal judicial interference with it save in clear cases." (Chicago G. W. Ry. Co. v. Kendall, 266 U. S. 94, l. c. 101.)

"One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce." (Foster-Fountain Packing Co., Inc. et al. vs. Haydel et al., No. 68—Opinion by Mr. Justice Butler, delivered October 15th, 1928.)

Applying the foregoing principles in the consideration of the case at bar, it is obvious that this tax is not upon property but the amount of the tax is measured by property located within the State of Missouri; that the state authorities were careful to compute the tax upon such property and that there was no effort to impose a tax measured upon property not situated within the state, nor was such its effect. The method of computation was fixed by statute and the taxing authorities were bound thereby.

In the case of the Hump Hairpin Co. v. Emmerson, 258 U. S. 290, the Supreme Court had practically the same question as here presented. A West Virginia corporation had its place of business in the State of Illinois. It transacted practically all of its business there. It was engaged, however, in interstate commerce. The statute of Illinois, which was challenged, was very similar to the statute questioned in this case. A tax was computed upon the capital stock of the foreign corporation "represented by property located and business transacted" in the State of Illinois. Mr. Justice Clarke, who wrote the opinion for the court, said that—

[fol. 62] "While a State may not use its taxing power to regulate or burden interstate commerce * * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. * * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

The proposition is restated that—

"No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid."

Then referring to the Illinois statute, the court continued:

"Clearly the statute is not a disguised attempt to tax interstate commerce. On the contrary, its purpose plainly is to differentiate state from interstate business and to im-

pose the tax only on the former. Construed with other statutes the act accords equal treatment to domestic and foreign corporations, and clearly in this case property of the company beyond the jurisdiction of the State is not taxed."

To the same effect was the rule announced in St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350. In the latter case, the court based its decision upon Postal Telegraph Cable Company v. Adams, 155 U. S. 688, l. c. 696, where Mr. Chief Justice Fuller said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on [fol. 63] the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State."

The court also cited the case of Atlantic &c Telephone Co. v. Philadelphia, 190 U. S. 160, where the principle is announced that a state is not prevented from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce.

In Kansas City Ry. v. Kansas, 240 U. S. 227, the Supreme Court had a somewhat similar situation arising in the State of Kansas. Mr. Justice Hughes, delivering the opinion of the court, said:

"The authority of the state to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

In support of his opinion he cited the case of the Baltic Mining Co. v. Commonwealth of Massachusetts, 231 U. S. 68. This latter case dealt with questions very similar to the questions raised in the instant case.

In the case of Kansas City &c R. R. v. Stiles, 242 U. S. 111, the validity of an Alabama statute was questioned. A

similar tax had been provided for in that state. Mr. Justice Day, who delivered the opinion of the court, said, among other things:

"It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the State, and imposes a direct burden upon interstate commerce. Ob- [fol. 64] jections of this character were so recently discussed, and the previous cases in this court considered, in Kansas City &c Railway Co. v. Kansas, 240 U. S. 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the State could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the State. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other States."

In the case at bar, both domestic and non-domestic corporations are subject to the same tax. The State bases its tax upon the property of the corporation having its situs in Missouri exactly as in the case of domestic companies. To all intents and purposes, therefore, it would bring the instant case squarely within the decision of Roberts & Schaefer Co. v. Emmerson, supra. Moreover, an almost parallel case was determined by the Supreme Court of the United States in the case of Margay Oil Corporation v. Applegate, Attorney General, 273 U. S. 666. In that case, as in this, a Delaware Corporation, doing business in Arkansas, became subject to the Franchise Tax Law of that State. The complaint was made there, as here, to the effect that an arbitrary valuation was used as a basis for computing the tax. The Supreme Court of Arkansas in Margay Oil Corporation v. Applegate, Attorney General, 272 S. W. 845, sustained the tax and its judgment was affirmed in 273 U. S. 666. The affirmance of said case by the Supreme

Court was upon the authority of Roberts & Schaefer v. Emmerson, supra.

[fol. 65] 3. The attack upon the Corporation Act because of an alleged defect in its title is wholly without merit. Section 28 Article 4 of the Missouri Constitution forbids that any bill "shall contain more than one subject" and directs that such subject "shall be clearly expressed in its title."

The subject of the Act under consideration was authority to certain corporations to issue a variety of stocks; the regulation thereof; and "prescribing the method of determining the number of shares and capital of the corporations issuing shares in such manner."

Section 12 of the Act against which complaint is made is not a statute providing for taxes. It merely undertakes to provide a method of computing taxes upon corporations issuing stock withut nominal or par value. In providing for the issuance of such stock it was natural and proper for the Legislature to specify how same should be treated for taxation purpose. This was a part of the regulation mentioned in the title. It was part of the regulation stipulated in the title. It did no more than embody a rule clearly anticipated in the title and this rule became a formula in the hands of the State taxing authorities for computing a tax on both the domestic and foreign corporations.

In the matter of giving the stock in question a fanciful and unreal value, the statute is directed to the par value of all stocks without regard to actual value as a basis of computation. This might work inequitably in some cases as in this, but is not a matter with which we are concerned.

[fol. 66] In view of the above, the application for temporary injunction should be denied.

Kansas City, Missouri, November 2, 1928.

[File endorsement omitted.]

[fol. 67] In United States District Court

[Title omitted]

Order Denying Application for Temporary Injunction—Filed Nov. 2, 1928

The application of complainant for a temporary injunction being presented to a statutory court composed of the Honorable Kimbrough Stone, Circuit Judge, and the Honorable Albert L. Reeves, and the Honorable Merrill E. Otis, District Judges, and having been fully argued, presented and taken under submission and the court being fully advised in the premises, it is

Ordered that said application be and is hereby denied.

Dated this 2nd day of November, 1928.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. Merrill E. Otis, District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Minute Entry of Filing Petition for Appeal, etc.—Nov. 19, 1928

This day comes the Complainant herein, by its counsel-[fol. 68] lors, and files a Petition for Appeal, together with its Assignment of Errors, Bond on Appeal, and Order allowing appeal to the Supreme Court of United States; thereupon, Citation is duly issued and signed by the Court, admonishing the defendants, Stratton Shartel and C. Eugene Stephens, to be and appear in the United States Supreme Court in the City of Washington, District of Columbia, thirty days from and after the day said citation bears date.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL FROM ORDER DENYING INTERLOCUTORY INJUNCTION—Filed Nov. 19, 1928

To the Honorable Kimbrough Stone, Circuit Judge; Albert L. Reeves, District Judge, and Merrill E. Otis, District Judge:

Your petitioner, International Shoe Company, a corporation, complainant in the above entitled cause, believing itself aggrieved and injured by the order rendered and entered in the above entitled cause on the 2nd day of November, 1928, denying said complainant an interlocutory injunction in said cause, does hereby humbly pray an appeal from said order to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith.

Your petitioner further prays that a complete transcript of the record, proceedings and papers upon which said order was based and made be duly authenticated and sent to the Supreme Court of the United States for review.

And your petitioner will ever pray.

[fol. 69] International Shoe Company, Complainant, by Thompson & Thompson, James D. Williamson, R. E. Blake, Its Solicitors.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 19, 1928

Now comes International Shoe Company, complainant in the above entitled cause, and respectfully submits that in the records, proceedings and decisions of the District Court of the United States for the Central Division of the Western Judicial District of Missouri in the above entitled

matter and in the order therein denying complainant an interlocutory injunction there is manifest error in this, to-wit:

1. The Court erred in refusing and denying complainant's application for an interlocutory injunction preliminary to a final hearing enjoining defendants from enforcing, or attempting to enforce, against complainant the tax bill for $104,220.00 for complainant's corporation franchise taxes for the year ending December 31, 1928.

2. The Court erred in holding that the question of due process of law, absence of uniformity, taxation in proportion to value and equal protection of the law, had been settled in Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50 and other decisions.

[fol. 70] The Court erred in holding that the only Federal Constitutional question to determine was whether the franchise tax assessed against complainant was such a burden on interstate commerce as to warrant interference by the Court.

4. The Court erred in holding that the said tax in question is not in its effect a tax upon property.

5. The Court erred in holding that said tax had been measured by and based upon complainant's property having its situs in Missouri.

6. The Court erred in holding that said tax was not in effect a tax upon or measured by complainant's property not situated in Missouri.

7. The Court erred in holding that both domestic and non-domestic corporations are subject to the same franchise taxes.

8. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri, approved April 12, 1921 (Laws of Missouri 1921, pp. 661-666) as an amendment or supplement to the Corporation Franchise Tax Law of the State of Missouri (Sections 9836, to 9848, inclusive, Revised Statutes of Missouri, 1919, as amended by the Act approved August 4, 1921, and appearing in the Laws of Missouri Extra Session 1921, pp. 121-126, inclusive), and

said Corporation Franchise Tax Law as so supplemented and amended are in contravention of the Constitution of the United States, especially of the Interstate Commerce clause of Section 8, Article 1, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri (Laws of Missouri 1921, pp. 661-666) as interpreted and construed by the Supreme Court of Missouri in State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, insofar as it relates to the assessment of franchise taxes, is unconstitutional and void because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon complainant a franchise tax that denies complainant the equal protection of the [fol. 71] law and that is confiscatory and taxes complainant's property without the state of Missouri, thereby depriving complainant of its property without due process of law.

10. The Court erred in refusing to hold that said Section 12 as interpreted and construed in said case of State v. Pierce Petroleum Corporation, insofar as it relates to the assessment of corporation franchise taxes, is unconstitutional and void because it violates Section 8 of Article 1 of the Constitution of the United States in that it imposes upon complainant a tax that burdens complainant's interstate commerce.

11. The Court erred in holding that said Section 12 as construed in said case of State v. Pierce Petroleum Corporation, insofar as it relates to the assessment of corporation franchise taxes, does not violate either Section 1 of the Fourteenth Amendment of the Constitution of the United States or Section 8 of Article 1 of the Constitution of the United States.

12. The Court erred in refusing to hold that Section 9836 of the Corporation Franchise Tax Law of Missouri (Laws of Missouri 1921, Extra Session, pp. 121-126) as amended and supplemented by Section 12 of the Stock Corporation Act as interpreted and construed in said case of State v. Pierce Petroleum Corporation is unconstitutional

and void because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon complainant a franchise tax that denies complainant the equal protection of the law and that is confiscatory and taxes complainant's property without the State of Missouri, thereby depriving complainant of its property without due process of law.

13. The Court erred in refusing to hold that said Section 9836 of the Corporation Franchise Tax Law of Missouri, as amended and supplemented by said Section 12 of the Stock Corporation Act, as interpreted and construed in said case of State v. Pierce Petroleum Corporation, is unconstitutional and void because it violates Section 8 of [fol. 72] Article 1 of the Constitution of the United States in that it imposes upon complainant a tax that burdens complainant's interstate commerce.

14. The Court erred in holding that said Section 9836 of the Corporation Franchise Tax Law of Missouri, as amended and supplemented by said Section 12 of the Stock Corporation Act, as interpreted and construed in the said case of State v. Pierce Petroleum Corporation, does not violate either Section 1 of the Fourteenth Amendment of the Constitution of the United States or Section 8 of Article 1 of the Constitution of the United States.

15. The Court erred in refusing to hold that the tax bill issued against complainant and the Corporation Franchise taxes represented thereby, the action of the State Tax Commission in computing said taxes and of the State Auditor in making out said tax bill, are illegal, unconstitutional and void because they (a) deprive complainant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (b) deny to complainant the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (c) burden complainant's interstate and foreign commerce, in violation of Section 8 of Article 1 of the Constitution of the United States, and (d) said taxes were assessed under said Corporation Franchise Tax Law and said Section 12 of said Stock Corporation Act interpreted and construed as

an amendment or supplement to said Franchise Tax Law as aforesaid, and said Corporation Franchise Tax Law and said Section 12 as so construed are unconstitutional and void in the particulars and for the reasons hereinbefore stated.

16. That said Section 12 of the said Stock Corporation Act, as an amendment and supplement to said Section 9836 of the Corporation Franchise Tax Law of the State of Missouri, does not provide a method for the taxation for franchise tax purposes of the proportion of the capital stock and surplus of foreign corporations (having no par stock) employed in business in the state of Missouri according [fol. 73] to its true value in money as applied by the Constitution of the State or by uniform rule as compared to other property in the State, but is really an intent to enforce against foreign corporations having no par stock the payment of a tax for the privilege of doing busines in such state by placing a fictitious value upon their capital stock and surplus employed within the State and in effect taxing their property beyond the State, and the Court erred in not so holding.

17. That the said assessment for franchise taxes made by the said State Tax Commission, and the tax bill as made out by the State Auditor of the State of Missouri against Complainant for the sum of $104,220.00, was not upon the true valuation in money, or the par value, of the proportion of complainant's capital stock and surplus employed in business in the State of Missouri, or upon any estimate of the value of the proportion of complainant's properties in the State of Missouri, but altogether upon the basis of other considerations, to-wit: An arbitrary or fictitious value of complainant's capital stock arrived at by multiplying the number of shares of its capital stock issued and outstanding, (3,760,000) by $100.00 per share, making a total of $376,000,000.00, and apportioning 54%, or $208,440,000.00 to the State of Missouri as the amount of capital stock and surplus employed in its business by complainant in said state, and figuring the franchise tax at one-twentieth of one per cent thereof, or $104,220.00, claiming and pretending that said sum so assessed represents the proportion of complainant's capital stock and surplus

employed within the State of Missouri, whereas said sum bears no relation to the true value of complainant's capital stock and surplus employed within said state, as its entire capital stock is $46,082,631.09, and its surplus is $52,956,249.12, making a total of $97,169,076.24, and the proportion employed in the State of Missouri is 54%, or $52,956,249.12; one-twentieth of one per cent of said amount is $26,478.12, and said franchise tax of $104,220.00 so assessed is nothing but an arbitrary assessment of a tax based on a fictitious or arbitrary value of complainant's [fol. 74] capital stock and surplus, apportioning 54% of such fictitious value to Missouri, without any reference whatever to the actual amount or value of capital stock and surplus employed by complainant in its business in the State of Missouri, and the Court erred in not so holding.

18. The arbitrary valuation of the shares of non par capital stock at $100.00 per share of a foreign corporation (whose shares have an actual value of $9.60) is not a reasonable basis for the determination of the proportion of capital stock and surplus employed in the State of Missouri for the purpose of the determination of annual fees to be imposes upon them for the privilege of doing business in the state, when the basis for the same privilege imposed on foreign corporation doing the same business, having a stock of par value is based on the par value of the proportion of such stock employed in the State of Missouri, and violates the equal protection clause of the Federal Constitution, and the Court erred in not so holding.

19. The franchise tax imposed upon complainant bears no relation whatever to the privilege granted it, a foreign corporation, to do business in the state of Missouri, and the Court erred in not enjoining the enforcement of such tax bill.

20. The Court erred in refusing to hold that said Section 12 of said Stock Corporation Act, as an amendment to said Section 9836 of the said Corporation Franchise Tax Law, is in contravention of the Constitution of the State of Missouri, especially of Section 30 of Article 2 providing that no person shall be deprived of property without due process of law, and of Section 3 of Article 10, providing that taxes shall be uniform upon the same class of subjects

within the state, and of Section 4 of Article 10 providing that all property subject to taxation shall be taxed in proportion to its value.

21. The Court erred in refusing to hold that said Section 12 of said Stock Corporation Act as an amendment to the said Corporation Franchise Tax Law is in contravention of the Constitution of the State of Missouri, especially Sec-
[fol. 75] tion 28 of Article 4, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, as in the title to said Stock Corporation Act no reference is made to corporation franchise taxes or to foreign corporations, and said Stock Corporation Act as construed contains more than one subject.

22. The Court erred in holding in its opinion and decision that a franchise tax is a mere "regulation" under the police powers of the state, and is covered and included in the word "regulate" as said word is used in the title of said Stock Corporation Act of 1921.

23. The Supreme Court of Missouri in the case of State ex rel. Marquette Hotel Investment Company v. State Tax Commission, 282 Mo. 213, held that corporation franchise taxes are taxes within the meaning of Sections 3 and 4 of Article 10 of the Constitution of Missouri, and shall be uniform and in proportion to the value of the property taxed, and this Court erred in not so holding.

And said complainant, International Shoe Company, says that it will rely on the foregoing Assignment of Erro-s in the prosecution of the appeal from the said order made and entered by this Honorable Court herein on the 2nd day of November, 1928, denying said complainant's application for an interlocutory injunction.

Wherefore said complainant, the appellant herein, prays that said order, denying complainant's application for an interlocutory injunction, be reversed, and for such other and further relief as the appellant may be entitled to obtain.

International Shoe Company, Complainant-Appellant, by Thompson & Thompson, James D. Williamson, R. E. Blake, Its Solicitors.

[File endorsement omitted.]

[fol. 76] Bond on Appeal for $1,000.00, approved and filed Nov. 19, 1928, omitted in printing.

[fol. 77] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Nov. 19, 1928

This cause coming on for further proceedings or attention upon the petition of the complainant International Shoe Company, praying an appeal to the Supreme Court of the United States from the order of this Court entered November 2, 1928, denying to complainant an interlocutory injunction, and the same being fully considered by the Court,

It is hereby ordered that an appeal to the Supreme Court of the United States from the order of this Court entered November 2, 1928 denying to complainant an interlocutory injunction be, and the same is hereby, allowed, and that a certified transcript of the record, exhibits, stipulations and all proceedings be duly authenticated and forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of One Thousand Dollars ($1000.00), and said bond in due form, with good and sufficient sureties thereon, being at this time presented, it is hereby approved and ordered filed as a part of the record in this case.

Dated this 19th day of November, 1928.

[fol. 78] Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. Merrill E. Otis, District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Minute Entry of Filing of Citation, etc.—Nov. 21, 1928

Comes now the plaintiff, by its solicitors, and files Citation with acknowledgment of service thereon, and there is also filed a Stipulation in re transcript of record.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Nov. 21, 1928

It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective solicitors, that the Clerk of the Court shall certify the complete record in the above entitled cause to the Supreme Court of the United States.

International Shoe Company, Complainant, by Thompson & Thompson, James D. Williamson, R. [fol. 79] E. Blake, Its Solicitors. Stratton Shartel, Attorney-General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, Defendants, by Stratton Shartel, W. E. Sloat, Their Solicitors.

[File endorsement omitted.]

[fol. 80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Dec. 13, 1928

Comes now International Shoe Company, a corporation, the plaintiff and appellant in the above entitled cause, by Guy A. Thompson, its Solicitor, and says that in its brief and argument in said Court in said cause it will rely upon the following points and propositions in support of its appeal, to-wit:

1. The Court erred in refusing and denying complainant's application for an interlocutory injunction preliminary to a final hearing enjoining defendants from enforcing, or attempting to enforce, against complaintant the tax bill for $104,220.00 for complainant's corporation franchise taxes for the year ending December 31, 1928.

2. The Court erred in holding that the questions of due process of law, absence of uniformity, taxation in proportion to value and equal protection of the law, had been settled in Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50 and other decisions.

3. The Court erred in holding that the only Federal Constitutional question to determine was whether the franchise tax assessed against complainant was such a burden on interstate commerce as to warrant interference by the Court.

[fol. 82] 4. The Court erred in holding that the said tax in question is not in its effect a tax upon property.

5. The Court erred in holding that said tax had been measured by and based upon complainant's property having its situs in Missouri.

6. The Court erred in holding that said tax was not in effect a tax upon or measured by complainant's property not situated in Missouri.

7. The Court erred in holding that both domestic and non-domestic corporations are subject to the same franchise taxes.

8. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri, approved April 12, 1921 (Laws of Missouri 1921, pp. 661-666) as an amendment or supplement to the Corporation Franchise Tax Law of the State of Missouri (Sections 9836 to 9848, inclusive, Revised Statutes of Missouri, 1919, as amended by the Act approved August 4, 1921, and appearing in the Laws of Missouri Extra Session 1921, pp. 121-126, inclusive), and said Corporation Franchise Tax Law as so supplemented and amended are in contravention of the Constitution of the United States, especially of the Interstate Commerce clause of Section 8, Article 1, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri (Laws of Missouri 1921, pp. 661-666) as interpreted and construed by the Supreme Court of Missouri in State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, insofar as it relates to the as-

sessment of franchise taxes, is unconstitutional and void [fol. 83] because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon complainant a franchise tax that denies complainant the equal protection of the law and that is confiscatory and taxes complainant's property without the state of Missouri, thereby depriving complainant of its property without due process of law.

10. The Court erred in refusing to hold that said Section 12 as interpreted and construed in said case of State v. Pierce Petroleum Corporation, insofar as it relates to the assessment of corporation franchise taxes, is unconstitutional and void because it violates Section 8 of Article 1 of the Constitution of the United States in that it imposes upon complainant a tax that burdens complainant's interstate commerce.

11. The Court erred in holding that said Section 12 as construed in said case of State v. Pierce Petroleum Corporation, insofar as it relates to the assessment of corporation franchise taxes, does not violate either Section 1 of the Fourteenth Amendment of the Constitution of the United States or Section 8 of Article 1 of the Constitution of the United States.

12. The Court erred in refusing to hold that Section 9836 of the Corporation Franchise Tax Law of Missouri (Laws of Missouri 1921, Extra Session, pp. 121-126) as amended and supplemented by Section 12 of the Stock Corporation Act as interpreted and construed in said case of State v. Pierce Petroleum Corporation is unconstitutional and void because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon complainant a franchise tax that denies complainant the equal protection of the law and that is confiscatory and taxes complainant's property without the State of Missouri, thereby depriving complain- [fol. 84] ant of its property without due process of law.

13. The Court erred in refusing to hold that said Section 9836 of the Corporation Franchise Tax Law of Missouri, as amended and supplemented by said Section 12 of the Stock Corporation Act, as interpreted and construed in said case of State v. Pierce Petroleum Corporation, is un-

constitutional and void because it violates Section 8 of Article 1 of the Constitution of the United States in that it imposes upon complainant a tax that burdens complainant's interstate commerce.

14. The Court erred in holding that said Section 9836 of the Corporation Franchise Tax Law of Missouri, as amended and supplemented by said Section 12 of the Stock Corporation Act, as interpreted and construed in the said case of State v. Pierce Petroleum Corporation, does not violate either Section 1 of the Fourteenth Amendment of the Constitution of the United States or Section 8 of Article 1 of the Constitution of the United States.

15. The Court erred in refusing to hold that the tax bills issued against complainant and the Corporation Franchise taxes represented thereby, the action of the State Tax Commission in computing said taxes and of the State Auditor in making out said tax bill, are illegal, unconstitutional and void because they (a) deprive complainant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (b) deny to complainant the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (c) burden complainant's interstate and foreign commerce, in violation of Section 8 of Article 1 of the Constitution of the United States and (d) said taxes were assessed under said Cor- [fol. 85] poration Franchise Tax Law and said Section 12 of said Stock Corporation Act interpreted and construed as an amendment or supplement to said Franchise Tax Law as aforesaid, and said Corporation Franchise Tax Law and said Section 12 as so construed are unconstitutional and void in the particulars and for the reasons hereinbefore stated.

16. That said Section 12 of the said Stock Corporation Act, as an amendment and supplement to said Section 9836 of the Corporation Franchise Tax Law of the State of Missouri, does not provide a method for the taxation for franchise tax purposes of the proportion of the capital stock and surplus of foreign corporations (having no par stock) employed in business in the state of Missouri according to its true value in money as applied by the Constitution of

the State or by uniform rule as compared to other property in the State, but is really an intent to enforce against foreign corporations having no par stock the payment of a tax for the privilege of doing business in such state by placing a fictitious value upon their capital stock and surplus employed within the State and in effect taxing their property beyond the State, and the Court erred in not so holding.

17. That the said assessment for franchise taxes made by the said State Tax Commission, and the tax bill as made out by the State Auditor of the State of Missouri against Complainant for the sum of $104,220.00, was not upon the true valuation in money, or the par value, of the proportion of complainant's capital stock and surplus employed in business in the State of Missouri, or upon any estimate of the value of the proportion of complainant's properties in the State of Missouri, but altogether upon the basis of other considerations, to-wit; An arbitrary or fictitious value [fol. 86] of complainant's capital stock arrived at by multiplying the number of shares of its capital stock issued and outstanding (3,760,000) by $100.00 per share, making a total of $376,000,000.00, and apportioning 54%, or $208,440,000.00 to the State of Missouri as the amount of capital stock and surplus employed in its business by complainant in said state and figuring the franchise tax at one-twentieth of one per cent thereof, or $104,220.00, claiming and pretending that said sum so assessed represents the proportion of complainant's capital stock and surplus employed within the State of Missouri, whereas said sum bears no relation to the true value of complainant's capital stock and surplus employed within said state, as its entire capital stock *as its entire capital stock* is $46,082,631.09, and its surplus is $52,956,249.12, making a total of $97,169,076.24, and the proportion employed in the State of Missouri is 54%, or $52,956,249.12; one-twentieth of one per cent of said amount is $26,478.12, and said franchise tax of $104,220.00 so assessed is nothing but an arbitrary assessment of a tax based on a fictitious or arbitrary value of complainant's capital stock and surplus, apportioning 54% of such fictitious value to Missouri, without any reference whatever to the actual amount or value of capital stock and surplus

employed by complainant in its business in the State of Missouri, and the Court erred in not so holding.

18. The arbitrary valuation of the shares of non-par capital stock at $100.00 per share of a foreign corporation (whose shares have an actual value of $9.60) is not a reasonable basis for the determination of the proportion of capital stock and surplus employed in the State of Missouri for the purpose of the determination of annual fees to be imposed upon them for the privilege of doing business in the state, when the basis for the same privilege imposed [fol. 87] on foreign corporations doing the same business, having a stock of par value is based on the par value of the proportion of such stock employed in the State of Missouri, and violates the equal protection clause of the Federal Constitution, the Court erred in not so holding.

19. The franchise tax imposed upon complainant bears no relation whatever to the privilege granted it, a foreign corporation, to do business in the state of Missouri, and the Court erred in not enjoining the enforcement of such tax bill.

20. The Court erred in refusing to hold that said Section 21 of said Stock Corporation Act, as an amendment to said Section 9836 of the said Corporation Franchise Tax Law, is in contravention of the Constitution of the State of Missouri, especially of Section 30 of Article 2 providing that no person shall be deprived of property without due process of law, and of Section 3 of Article 10, providing that taxes shall be uniform upon the same class of subjects within the state, and of Section 4 of Article 10 providing that all property subject to taxation shall be taxed in proportion to its value.

21. The Court erred in refusing to hold that said Section 12 of said Stock Corporation Act as an amendment to the said Corporation Franchise Tax Law is in contravention of the Constitution of the State of Missouri, especially Section 28 of Article 4, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, as in the title to said Stock Corporation Act no reference is made to corporation franchise taxes or to foreign corporations, and said Stock Corporation Act as construed contains more than one subject.

22. The Court erred in holding in its opinion and de-
[fol. 88] cision that a franchise tax is a mere "regulation" under the word "regulate" as said word is used in the title of said Stock Corporation Act of 1921.

23. The Supreme Court of Missouri in the case of State ex rel Marquette Hotel Investment Company v. State Tax Commission, 282 Mo. 213, held that corporation franchise taxes are taxes within the meaning of Sections 3 and 4 of Article 10 of the Constitution of Missouri, and shall be uniform and inproportion to the value of the property taxed and this Court erred in not so holding.

Respectfully submitted.
Guy A. Thompson, Solicitor for Plaintiff-Appellant.

Comes now International Shoe Company, a corporation, plaintiff-appellant, in the above entitled cause, by Guy A. Thompson, its Solicitor, and designates the entire record for printing, omitting only the formal heading and other formal or immaterial part.

Respectfully submitted.
Guy A. Thompson, Solicitor for Plaintiff-Appellant.

The above defendants-respondents, Stratton Shartell, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, by their Solicitors, acknowledge receipt of a copy of the foregoing statement of points to be relied upon and designation to print entire record, this 19th day of Nov., 1928.

[fols. 89 & 90] Stratton Shartell, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri, by Stratton Shartell and W. E. Sloat, Their Solicitors.

[fol. 91] [File endorsement omitted.]

Endorsed on cover: File No. 33,888. W. Missouri D. C. U. S. Term No. 579. International Shoe Company, appellant, vs. Stratton Shartell, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri. Filed December 13th, 1928. File No. 33,888.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY, a Corporation, (Plaintiff) Appellant, vs. STRATTON SHARTEL, Attorney-General of the State of Missouri, and C. EUGENE STEPHENS, State Treasurer of the State of Missouri, (Defendants) Respondents.	No. 579.

STATEMENT OF BASIS OF JURISDICTION TO REVIEW ON APPEAL INTERLOCUTORY DECREE BELOW.

Comes now International Shoe Company, a corporation, plaintiff and appellant in the above-entitled cause, by Guy A. Thompson, Frank A. Thompson, James D. Williamson and R. E. Blake, its solicitors, and, in compliance with Rule 12 of the Revised Rules of this Honorable Court, shows to the Court that the basis on which it is contended that this Court has jurisdiction to review on appeal the interlocutory decree below is the following, to wit:

This is an appeal from a decree of the United States District Court for the Western District of Missouri denying an application for an interlocutory injunction. The application for interlocutory injunction was heard and denied by a District Court composed of three Judges, one of whom was a Circuit Judge, convened and held pursuant to Section 380, Title 28, United States Code (Judicial Code, Sec. 266, as amended).

(a) The statutory provisions believed to sustain the jurisdiction are United States Code Section 345, Title 28, Chapter 9 (Judicial Code Section 238 as amended by the Act of February 13, 1925, Ch. 229, Section 1, 43 St. at Large 938), providing:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections and not otherwise:
>
> * * * * * * *
>
> "3. Section 380 of this title,"

and

Section 380, Title 28, United States Code (Judicial Code, Section 266, as amended by Act of March 4, 1913, Chapter 160, 37 St. at Large 1013, and by Act of February 13, 1925, Chapter 229, 43 St. at Large 938), providing:

> "* * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * *"

(b) The date of the interlocutory decree sought to be reviewed is November 2, 1928 (Rec., p. 67).

The date on which the application for this appeal was presented was November 19, 1928 (Rec., p. 67).

(c) This case was instituted by the International Shoe Company, a Delaware corporation qualified and licensed to do and doing business in the State of Missouri, against the Attorney-General and State Treasurer of said State, in the District Court of the United States, Central Division, Western District of Missouri, to restrain the collection of a franchise tax of $104,220.00 assessed against the International Shoe Company for the year 1928; to restrain the institution of a suit for the recovery of such franchise tax and the collection of a penalty of 25 per cent thereon and interest thereon at the rate of one per cent (1%) per month, as provided by the laws of the State of Missouri; to remove the cloud or lien upon the property and assets of the International Shoe Company within the State of Missouri, created against same by the assessment of said franchise tax, and to have declared unconstitutional Section 12 of the Stock Corporation Act of the State of Missouri as an amendment or supplement to the Corporation Annual Franchise Tax Law of said State, and said Corporation Annual Franchise Tax Law as supplemented and amended by said Section 12 of said Stock Corporation Act, upon the ground that said Section 12 of the Stock Corporation Act as an amendment or supplement to said Corporation Franchise Tax Law and said Corporation Annual

Franchise Tax Law supplemented and amended by Section 12, and the said franchise tax assessed thereunder against appellant (1) deprive appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (2) deny appellant equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; (3) burden interstate and foreign commerce, in violation of Section 8, Article I of the Constitution of the United States (Bill of Complaint, Rec., pp. 1-26, specifically 3-22-23, 27-29).

A statutory court required by Section 380, Title 28, U. S. Code (Section 266 as amended of the United States Judicial Code), consisting of a Circuit Judge and two District Judges, was convened, and, after notice, the prayer of the bill for an interlocutory injunction was presented to and heard by said statutory three-judge court on the 23rd day of October, 1928, all of the parties being present and participating in said presentation (Rec., p. 56).

Thereafter, to wit, on the 2nd day of November, 1928, all of said Judges concurring, said application was denied, and said Judges, on said 2nd day of November, 1928, signed and entered their order denying an interlocutory injunction in said case (Rec., p. 67).

In connection with the entry of said order said Judges filed their written opinion upholding the constitutionality of the aforesaid Section 12 of said Stock Corporation Act, and of the aforesaid Corporation Annual Franchise Tax

Law, particularly of Section 9836 thereof, and of the aforesaid franchise taxes assessed thereunder (Rec., p. 58).

(d) The cases believed to sustain the jurisdiction of this Honorable Court on this appeal are:

Re Buder, 271 U. S. 462;
Airway Electrical Appliance Corporation v. Day, 266 U. S. 1;
St. Louis & Francisco Railroad Co. v. Middlekamp, 256 U. S. 226;
Wallace v. Hines, 253 U. S. 66;
Looney v. Crane Co., 245 U. S. 178;
Rast v. Van Deman and Lewis Co., 240 U. S. 341;
Ohio Tax Cases, 232 U. S. 576.

Respectfully submitted,

GUY A. THOMPSON,
FRANK A. THOMPSON,
JAMES D. WILLIAMSON,
R. E. BLAKE,
Solicitors for Appellant International Shoe Company.

FILED
MAR 13
CHARLES ELMORE

NO. 579

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY, a Corporation,
Appellant,

vs.

STRATTON SHARTELL, Attorney-General of the State of Missouri, and C. EUGENE STEPHENS, State Treasurer of the State of Missouri,
Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

GUY A. THOMPSON,
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SUBJECT INDEX.

	Page
Statement of case	2
Assignment of errors	14
Summary of argument	18
Argument	22

Table of Cases and Statutes.

Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71 ..... 19, 20, 21, 30, 39

Alpha Portland Cement Co. v. Mass., 268 U. S. 203, l. c. 218 ..... 20, 31

Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U. S. 280 20

Baltic Mining Co. v. Mass., 232 U. S. 68 ..... 20, 31

Constitution of Missouri, Section 28, Article V 22

Cudahy Packing Co. v. Hinkle, No. 278, Oct. Term, 1928 ..... 20, 32

Dane v. Jackson, 256 U. S. 589, l. c. 599 ..... 21, 44

Douglas v. County of Pike, 101 U. S., l. c. 686 18

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494 37

Henderson Bridge Co. v. Henderson, 173 U. S. 592, l. c. 615 ..... 21, 44

In re Thermiodyne Radio Corporation, 26 Fed. Rep. (2d) 716 ..... 19, 36

International Paper Co. v. Mass., 246 U. S. 135 20

International Text Book Co. v. Pigg, 246 U. S. 91 20

Locomobile Co. v. Mass., 246 U. S. 146 20

Looney v. Crane Co., 245 U. S. 178 ..... 20, 32

Ludwig v. Western Union Telegraph Co., 216 U. S. 146, l. c. 163 20

Maine v. Grand Trunk R. Co., 142 U. S. 217 ..... 21, 40

Margay Oil Co. v. Appelgate, 273 U. S. 666 44

Missouri Corporation Annual Franchise Tax Law 2, 47

Missouri Stock Corporation Act 22, 27, 52

O'Gara Coal Co. v. Emmerson, 326 Ill. 18 ..... 19, 20, 21, 34

Opinion delivered below by three-Judge Court, Western District of Missouri:

International Shoe Co. v. Shartel, 29 (2d) Fed. Rep. 604 1

Ozark Pipe Line Corporation v. Monier, 266 U. S. 562, l. c. 568 21
Pembina Con. Min. Co. v. Penn., 125 U. S. 181 ..... 21, 39
People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433 21
People ex rel. Terminal and Town Taxi Co. v. Walsh, 202 App. Div. (N. Y.) 651 ..... 19, 36
Postal Telegraph & Cable Co. v. Adams, 155 U. S. 688 ..... 21, 40
R. S. Missouri 1919, Sections 9836, 9837, 9838 and 9843, as amended Laws 1921, Extra Session, pages 122 to 126 ..... 2, 3, 4, 28
Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50 ..... 19, 21, 33
Southard v. Short, 8 (2d) S. W. 903 ..... 18, 23
Southern R. Co. v. Green, 216 U. S. 400 19
Southern R. Co. v. Kentucky, 274 U. S. 76, l. c. 80 ..... 21, 43
Staples v. Kirby Petroleum Co., 250 S. W. 293 ..... 19, 32
State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 282 Mo. 213 ..... 4, 18, 23
State ex rel. v. Sullivan, 282 Mo. 261 24
State ex rel. Wabash Ry. Co. v. Williams, 284 Mo. 456 ..... 4, 19, 24, 41
State v. Freehold Investment Co., 305 Mo. 88 ..... 4, 19, 24
State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790 ..... 6, 19, 22, 24
St. L. & I. M. R. Co. v. Ark., 235 U. S. 350 ..... 21, 41, 42
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346 38
Terrell v. Burke Constr. Co., 257 U. S. 529 37
Thornton v. Duffy, 254 U. S. 361 ..... 18, 25
Union Tank Line Company v. Wright, 246 U. S. 275, l. c. 282 ..... 21, 40
Western Union Telegraph Co. v. Kansas, 216 U. S. 1 ..... 20, 38

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Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

I.

The opinion of the District Court (by a Three-Judge Court) is reported in 29 Fed. (2nd) 604.

II.

JURISDICTION.

Paragraph 1 of rule 12 has been complied with in this case, and this Court has determined that it has probable jurisdiction to hear the case.

III.

STATEMENT OF THE CASE.

This case arose under the Missouri Franchise Tax Law for the payment of annual franchise taxes.

The annual franchise tax law of the State of Misouri was enacted in 1917, and now appears as Sections 9836 to 9848, inclusive, of the Revised Statutes of Missouri, 1919. This law was amended in August, 1921, by the Legislature. The law and the amendment thereto are given in full in appendix "A" to this brief. Section 9836 of the Revised Statutes of Missouri, as amended, is as follows:

> "Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state, shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal

to one-twentieth of 1 per cent of its outstanding capital stock and surplus employed in this state, and for the purpose of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located.

"Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; Provided" etc.

Section 9837 prescribes the information that the corporation shall file with the Missouri Tax Commission in its annual report upon which its annual franchise tax shall be based.

Section 9838 requires the State Tax Commission to determine from the facts reported, and from any facts within or coming to its knowledge, "the proportion of the capital stock and surplus of each corporation employed in business in this state," and the amount of tax, and to report the same to the State Auditor, who shall make out a tax bill therefor and deliver it to the State Treasurer.

Section 9842 provides that the taxes and penalties shall be a first lien on the property of the taxpayer.

Section 9843 provides for penalties for failure to pay the tax.

The other sections of the law are not pertinent to further statement of the case.

In 1920 this law first came under review by the Supreme Court of Missouri, and in April of that year in the case of **State ex rel. Marquette Hotel Investment Company v. State Tax Commission**, 282 Mo. 213, the Court decided (p. 234):

> "The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business. Franchise taxes to be fair should be measured by the volume of the business. The volume can best be measured by the property used in the business."

This was reaffirmed a little later (the following October) by the Supreme Court in **State ex rel. Wabash Railway Company v. Williams**, 284 Mo. 456, and yet again July 31, 1924, in **State v. Freehold Investment Company**, 305 Mo. 88. In the latter case the Court said:

> "Section 1 (section 9836 above) clearly provided that every corporation, whether organized under the laws of this state or not, shall pay a corporation franchise tax to the extent that such corporation employs its capital and surplus in its business in this state."

In conformity with these opinions, the State Tax Commission, until the decision in February, 1928, in the Pierce Petroleum Corporation case, presently referred to, considered that the act "contemplated a tax upon the right to do business in accordance with the property actually used in the business," and assessed it upon the basis of "the property actually used by the corporation in its business" in this state. That is to say, assessed one-twentieth of one per cent of such proportion of the par value of the outstanding capital stock, plus the surplus, of par-value stock corporations as the property of such companies in Missouri bore to all of their property wherever situated; and assessed one-twentieth of one per cent of such proportion of the amount paid in for capital stock, plus the surplus of nonpar stock corporations as such corporations' property in Missouri bore to all of their property wherever located.

Prior to 1921 there was no provision in the Missouri statutes for the formation of corporations with nonpar shares of stock, and in 1921 the Missouri Legislature, at its regular session, passed what is called the Stock Corporation Act, providing for the formation under the law of Missouri of corporations with par and nonpar shares. The full text of this act is given in this brief as Appendix B.

Section 12 of that act is as follows:

"Section 12. Taxes to Be Paid—How Computed.—For the purpose of computing any organization taxes

required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof, and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act shall be considered the equivalent of a share having a nominal or par value of $100.00."

On February 4, 1928, the Supreme Court of Missouri, in the case of **State of Missouri v. Pierce Petroleum Corporation**, 2 (2d) S. W. 790, while expressly reaffirming the interpretation of section 9836 in the above cases of State ex rel. Marquette Hotel Investment Company v. State Tax Commission, State ex rel. Wabash Railway Company v. Williams, and State v. Freehold Investment Company, and quoting with approval the above quotation from the Marquette Hotel Investment Company case, held that this section 12, in effect, supplemented and amended section 9836 by prescribing as to nonpar stock corporations (domestic and foreign) "a basis or unit of measurement" to be used in determining "the property actually used in the business." This "basis or unit of measurement" the Court held to be the outstanding nonpar shares at $100.00 per share. That is to say, the Court held that, to measure and determine, under sections 9836 and 9838, the property "actually used in the business" by a nonpar stock corporation, the words "entire capital stock and

surplus" in said sections 9836 and 9838 should be construed to mean an amount equal to the number of such corporation's issued and outstanding shares, multiplied by $100.00 each, plus its surplus.

The International Shoe Company, conformably with Section 9837 of the Revised Statutes providing for reports and payment of franchise taxes, on form prescribed by the State Tax Commission of Missouri, made its corporation franchise tax report for the year 1928, showing the following facts (Rec., pp. 7-8):

Capital stock subscribed:		
Common	$36,082,631.09	3,760,000 shares
Preferred	10,000,000.00	100,000 shares
	$46,082,631.09	
Capital stock issued and outstanding....	$46,082,631.09	
Capital stock paid up.	46,082,631.09	
Par value of stock:		
Common	No par value	
Preferred		$100.00 per share
Paid in for each share of non-par stock....		$9.60
Surplus	$51,086,445.15	
Clear market value of property and assets in State of Missouri.	$52,956,249.12	
Clear market value of property and assets without the State of Missouri	$44,212,827.12	

7

Clear market value of total property and assets $97,129,076.24
Total value of assets in Missouri $52,956,249.12
or 54% of total property.

Based upon that report the State Tax Commission, applying the "basis or unit of measurement" of the Pierce Petroleum Corporation case, valued the 3,760,000 shares of nonpar stock at $100.00 per share, making $376,000,000.00, added thereto $10,000,000.00 for preferred stock, making total capital stock $386,000,000.00; apportioned 54 per cent to the State of Missouri, making $208,440,000.00, and assessed an annual franchise tax in the sum of $104,220.00 against the International Shoe Company for the year 1928.

The International Shoe Company, a Delaware corporation, licensed to do business in the State of Missouri, then filed its bill in the United States District Court for the Western District of Missouri to restrain the appellees, the Attorney-General and the State Treasurer of the State of Missouri, from collecting or enforcing the annual franchise tax in the sum of $104,220.00 assessed against it for the year 1928 by the Missouri Tax Commission, and to remove cloud from title to its properties cast by said tax, alleging that its capital stock and surplus were as shown by its tax return; that it owned and operated forty-three factories, twenty-four of which were located in Missouri, nine in the State of Illinois, nine in the State of New Hampshire and

one in the State of Kentucky; that the total volume of its business was two hundred and ten thousand pairs of shoes per day; that the same were sold in interstate commerce; that not more than 5¼ per cent of its annual sales were made to customers in Missouri; that during the year 1927 complainant manufactured in its factories in Missouri shoes of the value, and which were sold for, $81,424,270.67, all of which shoes were sold in interstate commerce, except shoes to the amount and value of $6,535,598.78, which were sold in Missouri; that during the same period in its factories located outside of Missouri it manufactured and sold shoes of the value of $42,882,063.16, which were sold and shipped to customers in states other than Missouri.

It was further alleged that the tax which was properly due by the International Shoe Company, under a proper construction of the act, was $26,478.12, being one-twentieth of 1 per cent of its actual capital stock and surplus employed in Missouri, or of "the property actually used by it in its business" in Missouri, and that the tax so calculated was the tax which had theretofore been held to be a proper annual franchise tax upon appellant, and that appellant had offered and still offers to pay said sum in full of its franchise taxes for the year 1928. It was further alleged by appellant that it had filed its return, as above set forth, showing the true facts incident to its property, and the value of its property and proportion of its capital stock and surplus employed in the State of Missouri, and it was alleged that the State Tax Commission,

in arriving at the annual franchise tax to be assessed against it on its capital stock and surplus employed in business in the State of Missouri, disregarded the subscribed and paid-in capital for its common no-par shares, which amounted to $36,082,631.09, but arbitrarily multiplied the number of its no-par shares issued and outstanding, 3,760,000, by $100.00 per share and valued same at $376,000,000.00, added thereto $10,000,000.00, which had been paid for its preferred shares, and thus, arbitrarily, found its capital stock to be $386,000,000.00, and allocated 54 per cent of the capital stock thus found to the State of Missouri, and valued its capital stock employed in said state at $208,440,000.00, and for the year 1928 assessed the annual franchise tax thereon at one-twentieth of 1 per cent thereof, which aggregated $104,220.00. It was alleged that the law under which said tax was assessed, and such tax, were void and unconstitutional on the following grounds: That the statutes of Missouri, under which said tax was assessed, and levied, violated the Constitutions of the United States and of the State of Missouri in the following particulars:

(1) That the tax is a burden upon and a regulation of interstate commerce, in violation of Section 8, Article I, of the United States Constitution.

(2) That the tax is, in truth and in fact, a tax on property neither located nor used in the State of Missouri, but is a tax on rights, privileges and property beyond the jurisdiction of the state; that said tax is grossly arbitrary

and confiscatory and deprives appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(3) That the construction of Section 12 of the Stock Corporation Act as an amendment or supplement to the Corporation Annual Franchise Tax Law rendered such section void under Section 28 of Article IV of the Constitution of the State of Missouri, because the title of the Stock Corporation Act is misleading, and the subject of the act is not clearly expressed in the title, and the act contains more than one subject, in that said act, as construed by the Supreme Court of Missouri in the case of State v. Pierce Petroleum Co., Vol. 2 (2d) S. W. Rep. 790, makes it an amendment or supplement to the Annual Franchise Tax Law.

(4) That said tax violates Section 3 of Article X of the Constitution of Missouri in that said taxes are not uniform.

(5) That said tax violates Section 4 of Article X of the Constitution of the State of Missouri in that appellant's property is not taxed in proportion to its value.

(6) That said tax violates the Fourteenth Amendment to the Constitution of the United States in that it denies to appellant equal protection of the laws (Rec., pp. 1 to 37).

The answer of appellees admitted that the return of the International Shoe Company was true; that the value of the property was as therein stated; that 54 per cent of its

property was located in the State of Missouri; that the franchise tax for the year 1928 tendered to the State Treasurer was the proper amount of tax upon its capital stock and surplus actually employed in the State of Missouri under the construction of said Franchise Tax Law prior to the decision of the Supreme Court of Missouri in the case of State v. Pierce Petroleum Co., Vol. 2 (2nd) S. W. Rep. 790; but that since such decision the State Tax Commission was authorized to arbitrarily assess the tax upon the basis upon which same had been assessed (Answer of Appellees, Rec., pp. 42-47).

Hearing Before the Court.

Upon the hearing of the case before a Three Judge Court, the Court denied the preliminary injunction prayed for, and held:

That Section 12 of the Stock Corporation Act of Missouri, as an amendment to Article 9836 of the Annual Franchise Tax Law, did not violate the Constitution of the State of Missouri forbidding any law to contain more than one subject which must be clearly expressed in its title, because section 12, authorizing the computation of corporation franchise tax by placing a value of $100.00 on no-par value stock, was not a statute providing for taxes, but merely provided a method for computing taxes for corporations issuing stock without nominal or par value

and this, the Court said, was a "regulation" mentioned in the title.

That the Missouri Franchise Tax Law as construed did not deprive the International Shoe Company of its property without due process of law; that its interstate commerce was not unduly burdened; that there was no absence of uniformity in the tax, and that there was no unlawful proportion as to value, and that the International Shoe Company had not been denied the equal protection of the law.

> "That all of the above questions, save as to the effect on interstate commerce, were settled in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, and that the tax did not burden interstate commerce" (p. 605).

It is from this decision that this case is brought before this Court for review.

ASSIGNMENTS OF ERROR URGED.

1. The Court erred in refusing to hold that said Section 12 of said Stock Corporation Act as an amendment to the said Corporation Franchise Tax Law is in contravention of the Constitution of the State of Missouri, especially section 28 of article IV, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, as in the title to said Stock Corporation Act no reference is made to corporation franchise taxes or to foreign corporations, and said Stock Corporation Act as construed contains more than one subject.

2. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri, approved April 12, 1921 (Laws of Missouri 1921, pp. 661-666) as an amendment or supplement to the Corporation Franchise Tax Law of the State of Missouri (Sections 9836 to 9848, inclusive, Revised Statutes of Missouri, 1919, as amended by the act approved August 4, 1921, and appearing in the Laws of Missouri, Extra Session 1921, pp. 121-126, inclusive), and said Corporation Franchise Tax Law as so supplemented and amended are in contravention of the Constitution of the United States, especially of the Interstate Commerce clause of Section 8, Article I, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri (Laws of Mis-

souri 1921, pp. 661-666) as interpreted and construed by the Supreme Court of Missouri in State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, in so far as it relates to the assessment of franchise taxes, is unconstitutional and void because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon appellant a franchise tax that denies appellant the equal protection of the law, and that is confiscatory and taxes appellant's property without the State of Missouri, thereby depriving appellant of its property without due process of law.

4. The Court erred in refusing to hold that said section 12 as interpreted and construed in said case of State v. Pierce Petroleum Corporation, in so far as it relates to the assessment of corporation franchise taxes, is unconstitutional and void because it violates Section 8 of Article I of the Constitution of the United States in that it imposes upon appellant a tax that burdens appellant's interstate commerce.

5. The Court erred in refusing to hold that Section 9836 of the Corporation Franchise Tax Law of Missouri (Laws of Missouri 1921, Extra Session, pp. 121-126) as amended and supplemented by Section 12 of the Stock Corporation Act as interpreted and construed in said case of State v. Pierce Petroleum Corporation is unconstitutional and void because it violates the Fourteenth Amendment of the Con-

stitution of the United States in that in its effect and practical operation it imposes upon appellant a franchise tax that denies appellant the equal protection of the law and that is confiscatory and taxes appellant's property without the State of Missouri, thereby depriving appellant of its property without due process of law.

6. That the said assessment for franchise taxes made by the said State Tax Commission, and the tax bill as made out by the State Auditor of the State of Missouri against appellant for the sum of $104,220.00, was not upon the true valuation in money, or the par value, of the proportion of appellant's capital stock and surplus employed in business in the State of Missouri, or upon any estimate of the value of the proportion of appellant's properties in the State of Missouri, but altogether upon the basis of other considerations, to wit, an arbitrary or fictitious value of appellant's capital stock arrived at by multiplying the number of shares of its capital stock issued and outstanding (3,760,000) by $100.00 per share, making a total of $376,000,000.00, and apportioning 54 per cent, or $208,440,000.00, to the State of Missouri as the amount of capital stock and surplus employed in its business by appellant in said state, and figuring the franchise tax at one-twentieth of one per cent thereof, or $104,220.00, claiming and pretending that said sum so assessed represents the proportion of appellant's capital stock and surplus employed within the State of Missouri, whereas said sum

bears no relation to the true value of appellant's capital stock and surplus employed within said state, as its entire capital stock is $46,082,631.09, and its surplus is $52,956,-249.12, making a total of $97,169,076.24, and the proportion employed in the State of Missouri is 54 per cent, or $52,-956,249.12; one-twentieth of one per cent of said amount is $26,478.12, and said franchise tax of $104,220.00 so assessed is nothing but an arbitrary assessment of a tax based on a fictitious or arbitrary value of appellant's capital stock and surplus, apportioning 54 per cent of such fictitious value to Missouri, without any reference whatever to the actual amount or value of capital stock and surplus employed by appellant in its business in the State of Missouri, and the Court erred in not so holding.

7. The Court erred in holding that the question of due process of law, absence of uniformity, taxation in proportion to value and equal protection of the law had been settled in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, and other decisions.

SUMMARY OF ARGUMENT.

I.

The Missouri Act violates Section 28, Article IV, of the Missouri Constitution.

Southard v. Short, 8 (2nd) S. W. 903.

II.

This Court has not heretofore had occasion to consider a franchise tax law which, in its terms and in its construction by the highest court of the state, is the same as the Franchise Tax Law here in question.

III.

The construction of the statute by the highest court of the state is a part of the statute as effectively as if it had been written therein and adopted by the Legislature.

Thornton v. Duffy, 254 U. S. 361;
Douglas v. County of Pike, 101 U. S., l. c. 686.

IV.

The Missouri Franchise Tax Law, as construed by the highest court of the state, contemplates a tax "in accordance with the property actually used in the business" in this state.

Marquette Hotel Investment Co. v. State Tax Commission, 282 Mo. 213;

State ex rel. Wabash Railway Co. v. Williams, 284 Mo. 456;
State v. Freehold Investment Co., 305 Mo. 88;
State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, l. c. 795.

V.

The "basis or unit of measurement" prescribed by Section 12 of the Non-Par Stock Corporation Act of Missouri, as interpreted in State v. Pierce Petroleum Corporation, is arbitrary, fictitious and false, and does not either actually or presumptively determine "the capital stock and surplus employed in business in this state," or "the property actually used in the business" in the state.

VI.

Said "basis or unit of measurement" denies the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71;
Southern R. Co. v. Green, 216 U. S. 400;
People ex rel. Terminal and Town Taxi Company v. Walsh, 202 App. Div. (New York) 651;
Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
In re Thermiodyne Radio Corporation, 26 (2d) Fed. Rep. 716;
Staples v. Kirby Petroleum Co., 250 S. W. 293;
General Corporation Laws of Delaware.

VII.

Said "basis or unit of measurement" in its effect and necessary operation burdens interstate commerce, in contravention of the commerce clause of the Federal Constitution.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Telegraph Co., 216 U. S. 146;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
Baltic Mining Co. v. Mass., 231 U. S. 68;
Locomobile Co. v. Mass., 246 U. S. 146;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, l. c. 32;
Cudahy Packing Co. v. Hinkle, No. 278, decided February 18, 1929.

VIII.

Said "basis or unit of measurement" by its effect and necessary operation imposes a tax upon property outside the confines of the state, in violation of the due-process clause of the Fourteenth Amendment.

See cases last above cited.

IX.

Said "basis or unit of measurement" results in a tax that is arbitrary, excessive and confiscatory, and has no relation whatever to the value of the franchise charged for or to the "capital stock and surplus employed in business in this state," or to "the property actually used in business in Missouri," and, therefore, violates the due-process clause of the Fourteenth Amendment.

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555, at 562, 568;

Maine v. Grand Trunk R. Co., 142 U. S. 217;

Roberts & Schaeffer v. Emmerson, 271 U. S. 50, l. c. 57;

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71, l. c. 83;

Pembina Consolidated Silver Min. and M. Co. v. Penn., 125 U. S. 181;

Union Tank Line Co. v. Wright, 249 U. S. 275, l. c. 282;

Postal Telegraph & Cable Co. v. Adams, 155 U. S. 688;

St. Louis & Southwestern Railway Co. v. Arkansas, 235 U. S. 350;

State v. Williams, 284 Mo. 456;

Dane v. Jackson, 256 U. S. 589, l. c. 599;

Henderson Bridge Co. v. Henderson, 173 U. S. 592, l. c. 615;

Southern R. Co. v. Kentucky, 274 U. S. 76;

People ex rel. Commercial Cable Co. v. Morgan, 178 New York 433;

O'Gara Coal Co. v. Emmerson, 326 Ill. 18.

ARGUMENT.

In the case of **State v. Pierce Petroleum Co., 2 S. W. (2nd) 790,** the Supreme Court of Missouri held that Section 12 of the Stock Corporation Act of 1921 provided a new method for computing the franchise tax of nonpar stock corporations, both domestic and foreign, and was to that extent an amendment to the franchise tax law.

The title of the Stock Corporation Act passed by the Missouri Legislature in 1921 does not purport an amendment to the franchise tax law in any particular, and makes no reference whatever to franchise taxes or the computation of same, but purports solely to be an amendment to the Stock Corporation Act, provides for the organization and formation of corporations having both preferred and common shares without nominal or par value, and regulating the same. Section 12 of such act, if it be an amendment to the Franchise Tax law, is unconstitutional.

Section 28 of Article IV of the Missouri Constitution provides:

> "Bills must contain but one subject—exceptions—title.—No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section 44 of this article) shall contain more than one subject, which shall be clearly expressed in its title."

Section 44 of Article IV of the Constitution is in reference to the raising of revenue and not in reference to other bills.

The Supreme Court of Missouri has had occasion to consider the question of title, and has expressly held that where a bill is passed where the title does not comply with the provisions of article IV, section 28, it is unconstitutional (Southard v. Short, 8 S. W. Rep [2nd Series] 903, Missouri Supreme Court).

There has been filed in this court a brief and argument by Hon. John F. Green of the St. Louis bar, amicus curiae, on behalf of a number of other corporations. In order to prevent a duplication of argument and authorities, appellant adopts that brief as further argument upon this one question.

In 1920 the Franchise Tax Law of Missouri, and its construction, first came under review by the Supreme Court of Missouri, and that court, in the case of **State ex rel. Marquette Hotel Investment Company v. State Tax Commission**, 282 Mo. 213, says (p. 224):

> "Unequal taxes may not be imposed upon property of the same kind in the same condition and used for the same purposes" (citing and quoting Guthrie on Fourteenth Amendment).

And further (p. 225):

> "If, therefore, each of two corporations uses in its business the same amount of outstanding capital

stock and the same amount of other assets, each is using its franchise to the same extent. And it is therefore reasonable to assume that these franchises are of equal value. Each should therefore pay an equal amount of taxes."

And, finally (p. 234):

"The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business. Franchise taxes to be fair should be measured by the volume of the business. The volume can best be measured by the property used in the business."

This construction was reaffirmed by the same Court in **State ex rel. Wabash Railway Co. v. Williams, 284 Mo. 456; State v. Freehold Investment Company, 305 Mo. 88,** and **State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790.**

In the case of **State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261,** which was decided at a time when Missouri had no law providing for the incorporation of a corporation having shares of no par stock, the Court held:

"Though the common stock of a foreign corporation has no stated par value, it can be taxed in this state on the proportion of the capital stock represented by its business therein to the whole amount as required by Section 3039, Revised Statutes 1909, so that a license cannot be refused to such corporation under Section 3334, Revised Statutes 1909."

There is no question about the fact, therefore, that the Missouri Franchise Tax Law (Section 9836, Section 9838) means that corporations, domestic and foreign, par value and nonpar value, shall pay annual franchise taxes "in accordance with the property actually used in the business," in the state. Such is the construction of the law by the Supreme Court of Missouri, and that construction is as much a part of the statute as if it had been written therein and adopted by the Legislature (**Thornton v. Duffy, 254 U. S. 361; Douglas v. County of Pike, 101 U. S., l. c. 686**). As to corporations having par-value stock, the par value of its outstanding capital stock plus its surplus is taken as the basis by which to determine the property of the company "actually used in its business" in the state. As to corporations having stock without par value, the amount actually received by the corporations for its outstanding stock, plus its surplus, until the Pierce Oil Corporation decision, was taken as the basis by which to determine the property of such corporations "actually used in the business" in Missouri. To consider the capital stock of a par-value corporation to be in amount the par value of its issued stock is not only a rule of convenience, avoiding the possibility of dispute, but is a reasonable basis, because ordinarily, as common experience teaches, the par value of issued stock fairly represents the value of the capital stock. The fact that there has never been objection raised by any corporation to so measuring its capital stock is proof conclusive, if proof were needed,

that the assumption is a fair one. Such has been the construction and such the administration of the Franchise Tax Law of Missouri until the Pierce Petroleum decision. No difficulty was ever experienced in its administration, that is to say, in determining "the property actually used in the business" in the state, either as to par value or nonpar value corporations. As is observed in the Freehold Investment Company case (305 Mo. 88), it is no more difficult to determine "the property actually used in the business" in the state by a nonpar stock corporation than it is to determine the surplus of par value stock corporations.

We would emphasize the fact that the decision of the Supreme Court of Missouri (February, 1928) in State v. Pierce Petroleum Corporation, does not depart from its foregoing construction of the Franchise Tax Law. Indeed, it quotes with approval the above-quoted construction from the Marquette Hotel Investment Company case (282 Mo., l. c. 234). Our criticism is of "the basis or unit of measurement," which the decision finds in Section 12 of the Stock Corporation Act to be used in determining "the property actually used in the business" by foreign nonpar stock corporations. It is this "basis or unit of measurement" with respect to such corporations prescribed by section 12, as interpreted in the Pierce Petroleum case, which we contend renders the tax unconstitutional and void. That "basis or unit of measurement" as to such corporations is this: $100.00 per outstanding nonpar share shall, in all cases, be deemed to be the capital stock in computing the

franchise tax. In this respect the Court held that Section 12 of the Stock Corporation Act in effect supplemented and amended Section 9836 of the Franchise Tax Law.

It is manifest that this "basis or unit of measurement" is purely fictitious—indeed, the Court itself says that it is "an arbitrary valuation" (l. c. 794)—in all cases where the stock has been issued for less than $100.00 per share, and that its application does not either actually or presumptively disclose "the property actually used in the business" in the state; but in every case where, as here, the corporation has received but a small amount for its outstanding nonpar shares, results in a tax so ruthless, oppressive and confiscatory as to shock one's conception of common right and justice.

This Court has held in the **Airway** case (266 U. S. 71) that the number of shares of stock of a corporation which are authorized but not issued is not a reasonable measure of the fee which may be imposed upon it for the privilege of doing business in the state.

Section 12 of the Stock Corporation Act of 1921 does not attempt to provide for the annual franchise taxes of foreign corporations. It says:

> "For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or actual or ascer-

> tained value thereof * * * each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of $100.00."

The provisions of that act were solely for the incorporation in Missouri of corporations having nonpar shares, as well as par shares, and the regulation thereof. It had no relation whatever to foreign corporations.

Section 9836 relating to franchise taxes, in reference to foreign corporations, provides:

> "Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The proportion of the capital stock and surplus employed in business in the State of Missouri under the above definition is easily ascertainable. The par value of its capital stock and surplus is easily ascertainable.

There is no suggestion in the law that the number of shares of stock issued by a corporation shall have any relation whatsoever to the franchise tax assessed against it,

and as this Court has said, no state can require a foreign corporation to pay upon its entire capital stock in order to obtain the privilege of doing business. If, for the privilege of doing business in a foreign state, its entire capital stock cannot be the basis of a franchise tax, then upon what theory can 54 per cent of its capital stock be valued at double its capital stock and surplus for franchise tax purposes? To state the proposition answers it.

Not until the Stock Corporation Law of Missouri had been on the statute books seven years did the State Tax Commission discover, in Section 12 of the Stock Corporation Act, the possibility of establishing a new basis for the imposition and collection of annual franchise taxes on foreign nonpar stock corporations.

Under the decision in State v. Pierce the corporate share structure and not "the capital stock and surplus used in Missouri," or "the property actually used in the business" in Missouri, controls the tax. To illustrate, if the corporation has 460,000 shares of par value stock with the same capital and surplus as the International Shoe Company, and employs the same proportion in Missouri, then its tax is $26,478.12. If, in its corporate structure it has issued 460,000 shares of no-par stock with the same capital and surplus of the International Shoe Company, and uses the same per cent in the State of Missouri, then its franchise tax is $26,478.12. If, on the other hand, in its corporate structure it has 46,000 shares of no-par stock and its capital is the same as the capital and surplus

of the International Shoe Company, and it employs 54 per cent of its assets in the State of Missouri, then its franchise tax is $2,647.81.

This shows, that under the construction of section 12 by the Supreme Court in the Pierce Petroleum case the franchise tax as assessed is arbitrary, confiscatory, burdens interstate commerce, taxes property beyond the jurisdiction, and deprives appellant of its property without due process of law.

In the Pierce Petroleum case, however, all constitutional points in the case were left open, as the Court says in the concluding paragraph of its opinion (2 S. W. [2nd], loc. cit. 795):

> "In conclusion it should be said that it is not contended, nor does it appear, that the method provided by the statute for computing the franchise tax of corporations such as respondent, is confiscatory in effect, or that it operates to impose a tax upon property outside the state, or that it effects a burden on interstate commerce."

This Court, in **Airway Electric Appliance Corp. v. Day**, 266 U. S. 71, at page 89, says:

> "The act in its practical operation does not require like fees for equal privileges by foreign corporations in Ohio under the same circumstances. Unless by the laws of the state where organized they chance to be authorized to issue the same number of nonpar value

shares, the annual franchise fee imposed on foreign corporations having the same amount of property and business and exercising the same privileges in Ohio, will not be the same; and the charge imposed upon one may be many times that made against the other. * * * It is clear that the mere number of authorized nonpar value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such classification is not based on anything having relation to the purpose for which it is made. The act has no tendency to produce equality, and it is of such a character that there is no presumption that substantial equality will result from its application."

At page 82 the Court said:

"The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio and engaged in interstate commerce wherever the number of shares authorized subject to the charge of five cents each exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state * * * and that it necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

This Court held the same in effect in the cases of Alpha Portland Cement Co. v. Commonwealth of Mass., 268 U. S. 203; Baltic Mining Co. v. Commonwealth of Mass. and

Locomobile Co. of Amer. v. Commonwealth of Mass., 246 U. S. 146. This Court has recently applied the same principles in the case of Cudahy Packing Company v. Hinkle, No. 278, October Term, 1928, decided February 28, 1929.

This Court, in the case of **Looney v. Crane, 245 U. S. 178**, held:

> "The imposition of a state tax as a condition of admitting a foreign corporation engaged in interstate commerce to do business in the state based upon the amount of its authorized capital stock and of a **franchise tax** based upon the capital, surplus and undivided profits, constitutes an unlawful burden upon interstate commerce."

In the case of **Staples v. Kirby Petroleum Co., 250 S. W. 293**, the Texas Court, in reference to the provisions of the Delaware Statute fixing a value of $100.00 per share for nonpar shares for the purpose of fanchise taxation of corporations organized under the laws of Delaware, says:

> "It is only that part of a statute under which a charter is granted which grants or restricts the powers of the corporation that becomes a part of the charter. The Delaware statute, in that portion cited in this opinion, does neither. It related only to the question of taxation—a matter of which the State of Delaware has no interest in other states. For this reason alone it must be presumed that it was not intended to have extra-territorial force. But we are not left to conjecture in this matter. It is expressly limited to

'franchise taxes prescribed to be paid by corporations to this state (Delaware), and for no other purpose.' There is another reason why the law of the state granting the charter should not be applied in this state, in so far as it fixes the value of nonpar shares for taxing purposes in such state. Delaware fixes such value at $100.00 each. Suppose New York should fix such value for such purposes at $50.00 and New Jersey should fix the same at $10.00—the result of enforcing such laws in this state would be that, instead of corporations paying in proportion to their capital stock, as is contemplated by our statute, different corporations, chartered under the laws of different states, would be taxed unequally, contrary to the letter and spirit of the Constitution and laws of this state."

While it is true that this Court, in the case of **Roberts & Schaefer Co. v. Emmerson, 271 U. S. 150,** held that the State of Illinois could tax a domestic corporation a franchise tax based upon $100.00 per share for nonpar shares of stock, that holding was expressly based upon the proposition that the domestic corporation had acquired from the State of Illinois its charter and corporate existence, including the legal incidents and practical uses attaching to the issuance of nonpar value stock; hence, the state had a right in its legislation to require a corporation which should accept the benefits thereof, to pay a tax based upon such legislation.

The Supreme Court of Illinois, however, subsequent to the decision in the Roberts & Schaefer case, in passing

upon the validity of that statute as to foreign corporations, in the case of **O'Gara Coal Co. v. Emmerson,** 326 Ill. 18, at page 36, says:

> "Any system of taxation must have for its basis some standard of value. It may be the amount of business transacted, the amount invested in business, net profits or other standard capable of measurement in money. It is the province of the Legislature to determine the standard. If it is the amount of capital, the amount must be reducible in some way to terms of money, and it must be fixed with some regard to value, whether par value, issue price, market value, or value determined in some other manner and not by an arbitrary valuation at a set figure, whether $100.00, $5.00, or $500.00. There is no universal or generally prevalent law or custom which establishes the value of shares of stock of no-par value at any certain figure, and a law of one state which indicates that for purpose of taxation the shares of stock of foreign corporations having no par value shall be regarded as of a definite, specific value, is arbitrary, discriminatory and denies due process of law and the equal protection of the law. The terms of the General Corporation Act which provides that in the event that the corporation has stock of no-par value, its shares, for the purpose of fixing fees, shall be considered to be of the par value of $100.00 per share, are, therefore, discriminatory between foreign corporations having shares of stock of no-par value issued at different prices and in different amounts."

Again, page 47:

> "The number of shares into which the capital stock of foreign corporations may be divided is not a reasonable basis for classification of such corporations for the purpose of determining the amount either of the initial fee for a certificate of authority to do business in Illinois, or of the annual franchise tax, and, therefore, an arbitrary valuation of the capital stock of no-par value of such corporations at $100.00 a share, or any other definite amount a share, without reference to par value, sale price, market price, or any consideration other than number of shares, renders such classification discriminatory against corporations which have issued such stock at prices less than $100.00 a share, and denies to them due process of law and the equal protection of the laws."

In the State of New York, where the Franchise Tax Law provided "if such a corporation (foreign) has stock without par value, then the basis of the tax shall be such proportion of its paid-in capital as its real and tangible personal property in this state bears to its entirely real and tangible personal property." As to this provision the New York court held:

> "This was an entirely reasonable provision which imposed a tax which would bear equally upon all foreign corporations."

A new section was enacted providing:

> "If such corporation has stock without par value, then the basis of the tax shall be such a portion of its

issued capital stock as its gross assets employed in this state bear to the entire gross assets employed in its business, and its shares without par value shall be deemed to have a face value of $100.00 each, for the purpose of assessment."

As to the amendment, the Court, in **People ex rel. Terminal and Town Taxi Company v. Walsh**, 202 App. Div. (N. Y.) 651, says:

"The compulsory value of $100.00 required by the provisions as thus construed, to be placed upon every share of no-par value stock is entirely arbitrary and necessarily would result in unequal taxation. It would require corporations having issued stock of the actual value of $5.00 per share to pay the same tax per share as corporations having issued stock the shares of which were, in fact, worth $4,000.00 per share. It might have the result of compelling corporations employing in this state a capital of only $1,000.00 to pay for the privilege of doing their limited business the same tax as corporations employing within the state capital of $200,000.00. The words above quoted from the opinion of Judge Vann in the Mensching case, apply with equal force to the tax sought to be imposed in the case at bar under the provisions quoted from Section 2147 of the Tax Law and compel the conclusion that the provision is unconstitutional."

In the case of **In re Thermiodyne Radio Corporation, 26 Fed. (2nd) 716**, the District Court of Delaware held that a tax on a foreign corporation of a specified amount on

each share of no-par value capital stock for franchise tax purposes imposed by the tax law of New York was lacking in equality within the equal-protection clause of the United States Constitution, in the Fourteenth Amendment. That case was affirmed by the Circuit Court of Appeals for the Third Circuit in an opinion not yet officially reported, and this Court now has before it the determination of that case.

The line of demarkation separating foreign corporations that are without the equal-protection clause from those that come within it, is clearly set forth in this Court's opinion in the case of **Hanover Fire Ins. Co. v. Carr, 272 U. S. 494.**

It is true that a state may require certain things of a foreign corporation in order to engage in business within that state, but there is a very important qualification to such power, and that qualification is that the state may not exact, as a condition of the corporation engaging in business within its limits, that its rights secured by the Constitution of the United States be surrendered. This is illustrated by the law passed by the State of Arkansas which provided that the license of a foreign corporation should be revoked for exercising its constitutional right to remove a suit brought against it from the State Court to the Federal Court.

This Court, in **Terrell v. Burke Construction Co., 257 U. S. 529,** held that such law was unconstitutional. Likewise this Court has held that where a statute attempts to

subject foreign corporations to the payment of a tax which is a tax not only on the property of a corporation within the state, but also on its property without the state, that same is in violation of the due-process clause of the Fourteenth Amendment **(Western Union Telegraph Co. v. Kansas, 216 U. S. 1; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346).**

In the instant case the International Shoe Company came into the State of Missouri prior to the enactment of the Law of 1921 as to stock corporations and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which it has acquired under the sanction and permission of the laws of Missouri, and it is, therefore, entitled to protection against the imposition of an unreasonable and confiscatory tax under the Fourteenth Amendment to the Constitution.

The franchise tax under the laws of Missouri is not the sole tax upon a foreign corporation engaging in business in such state, but its general property taxes and other state taxes are the same as are paid by other persons on property and business in the state; and appellant has paid, as averred in the bill, ad valorem taxes of $69,775.00; manufacturers' license tax $67,889.15 and merchants' license taxes $59,703.78. In addition, the state is demanding an additional tax of $104,220.00 solely for the privilege of using its property in corporate form in Missouri.

The annual franchise tax cannot be a tax upon appellant's right to issue no-par stock, for this right was

granted by the State of Delaware, in which it was incorporated, and the State of Missouri cannot enlarge or restrict its powers as to the issuance of such no-par shares. This was held in **Airway Electric Appliance Corp. v. Day, 266 U. S., at page 83.**

The one and only privilege conferred by the State of Missouri to such a foreign corporation for which it may exact a charge called a franchise tax is the right to carry on its business in corporate form within the state (**Pembina Consol. Silver Min. & M. Co. v. Penn., 125 U. S. 181,** and the Air-Way case just cited). The case, therefore, must be distinguished from Roberts & Schaeffer v. Emmerson, which, of course, had to do with a franchise tax upon a domestic non-par stock company, with all of its property and business within the State of Illinois.

The charge for this privilege surely may not be arbitrary or confiscatory in amount. There must be some limit. It must be a reasonable charge. While we do not contend that it must be a **precise** equivalent for the value of the privilege for which the charge is made, yet it surely must take into consideration the value of that privilege and bear some reasonable relation thereto. As was said in the **Air-Way** case **(261 U. S. at p. 83)**:

> "Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

So in **Maine v. Grand Trunk R. Co., 142 U. S. 217:**

> "The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege."

Ordinarily franchise tax statutes prescribe formulae, or, in the language of Pierce Petroleum Corporation case, "bases or units of measurement" for determining the tax. Different formulae will be found in different states, but the purpose of all is to arrive at a tax reasonable in amount and that will fall with approximate **equality** on corporations similarly circumstanced.

In **Union Tank Line Co. v. Wright, 246 U. S. 275, l. c. 282,** this Court said:

> "If the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because in conflict with the commerce clause or the Fourteenth Amendment, or both."

In **Postal Telegraph and Cable Co. v. Adams, 155 U. S. 688,** this Court had under consideration the franchise tax of Massachusetts imposed upon a foreign corporation in lieu of other taxes. The Court said (p. 695):

> "But property in the state belonging to a corporation, whether foreign or domestic, may be taxed or a tax may be imposed on the corporation on account of its property within the state, and may take the

> form of a tax for the privilege of exercising its franchise within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state, the exaction therefor not being susceptible of exceeding the sum which might be leviable directly thereon."

This language was quoted with approval in St. Louis and Southwestern Railway Co. v. Arkansas, 235 U. S. 350, and was also quoted, approved and applied by the Supreme Court of Missouri in State v. Williams, 284 Mo. 456.

If a franchise tax in lieu of ad valorem and all other taxes may not exceed in amount the just equivalent of such taxes, surely when it is imposed in addition to the ad valorem tax, its amount may not exceed the ad valorem tax.

If the amount here demanded does not, because of the arbitrary manner in which it is assessed and its confiscatory size, take appellant's property without due process, then how arbitrary and large would the tax have to be to do so? If the "basis or unit of measurement" prescribed by section 12, as interpreted by the Pierce Petroleum case, is to be upheld, then why limit the fictitious value of the non-par shares to $100.00 per share when, by providing that they should be valued at $200.00 per share, appellant's capital stock would be increased to $754,000,000? Or, on the other hand, why not reduce appellant's capital to $103,000,000.00 by providing that the non-par shares should be considered at $25.00 a share, or to $3,760,000.00, by pro-

viding that the non-par shares should be considered of the value of $1.00 per share. Why fix $100.00 per share? There is no requirement in the law of Missouri (to say nothing of the varying laws in the other states) that par value stock shall be $100.00 per share, or any other amount, and, we dare say, that lawyers with wide experience in corporate affairs in that state will agree that there are as many corporations organized in Missouri with par-value stock of $50.00 and of $25.00 as there are with par-value stock of $100.00 per share, and that a great many have shares of $10.00 and of $1.00 par value.

Is it not manifest that the trouble with the "basis or unit measurement" of Section 12, as interpreted by the Pierce Petroleum case, is that it is purely fictitious and results in fixing the franchise tax without the slightest honest reference to "the property actually used in the business" in the state and, therefore, without the slightest reference to the value of the privilege granted and for which the charge is made? Indeed it would be difficult to conceive of a formula, or a basis, or a rule, by which to fix a franchise tax to be paid by foreign nonpar stock corporations that is more arbitrary, or more indifferent to the actual conditions, or that more utterly ignores "the property actually used in the business" in the state.

In **St. Louis, Southwestern Railway Company v. Arkansas, 235 U. S. 350**, the franchise tax statute of Arkansas fixing the tax at one-twentieth of one per cent of "the proportion of the outstanding capital stock of the corpora-

tion represented by property owned and used in business transacted in this state" was upheld on the ground that (p. 364):

> "* * * and we have no hesitancy in overruling the contention that the tax is repugnant to the due process clause on the ground of being in effect based on property located beyond the limits of the state; for this tax is measured by reference to property situated wholly within the confines of the state."

And again (p. 365) the Court said:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state."

In **Southern R. Co. v. Kentucky, 274 U. S. 76, p. 83**, this Court has said:

> "But if the method used in valuing property within the state is arbitrary, and the resulting valuation is grossly excessive, the tax (in this case, franchise tax) must be condemned as in contravention of the due process clause of the Fourteenth Amendment."

In the instant case the tax is not measured by reference to "property situated wholly within the confines of the

state," nor is it "based upon the amount and value of the property within the state," but is based upon an arbitrary, exorbitant and purely fictitious amount falsely called appellant's capital stock, and the necessary result is an arbitrary and excessive tax, or, as said in **Dane v. Jackson**, 256 U. S. 589, l. c. 599, a tax resulting in "such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to arbitrary taking of property without compensation."

Again, to use the language of this Court, in **Henderson Bridge Co. v. Henderson, 173 U. S. 592**, at page 615, there is here attempted "spoliation under the guise of asserting the power to tax."

Counsel are not unmindful of this Court's decision in the case of Roberts & Schaefer v. Emmerson, 271 U. S. 50, but in that case the sole question was the right of a state to prescribe its own rule for franchise taxes for domestic corporations with nonpar stock; nor are counsel unmindful of this Court's opinion in the case of Margay Oil Co. v. Applegate, 273 U. S. 666, but in that case this Court, without opinion, affirmed the decision of the Supreme Court of Arkansas, which appears in 269 S. W., at page 63, which held the basis of the franchise tax was fair and just. The affirmance of that decision by this Court did not mean a state could impose a basis for the valuation of capital stock for franchise tax purposes that would be confiscatory or unjust or burden interstate commerce.

The Arkansas law passed upon provides that no-par shares for franchise tax purposes shall be valued at $25.00 per share, and the tax is based upon the capital stock of the corporation alone. **No tax is imposed upon the surplus.** The Illinois statute which was passed upon based taxation **on capital stock ALONE. The Missouri law bases its tax upon capital stock and surplus.** The International Shoe Company has a surplus of over $51,000,000.00 in addition to its capital stock. It can thus be readily seen that valuing its no-par shares at $100.00 per share, adding thereto its par shares of $10,000,000.00 and its surplus of $51,000,000.00, and then apportioning 54 per cent of such amount to the State of Missouri as the part of capital stock and surplus employed or "the property actually used in its business" in such state, results in an absurdity; also the Supreme Court of Missouri has held in all cases decided that the Missouri Act "contemplates a tax upon the right to do business **in accordance with the property actually used in the business"** in the state. Upon what theory can the Court say that fifty-two millions of dollars of property represents $208,440,000.00 for franchise tax purposes?

It is respectfully submitted that the "basis or unit of measurement" prescribed by Section 12 of the Stock Corporation Act of Missouri, as that section is interpreted by the Supreme Court of that state in the Pierce Petroleum Corporation case, is wickedly arbitrary in its effect and practical operation; is a fictitious and false "unit or basis of measurement" laid down without the slightest reference

to the amount or the value of the foreign corporation's true capital stock, or its property within the state, or its business, and does not truly determine or even measurably approximate "the property actually used in the business" in the state; that it denies the equal protection of the laws, burdens interstate commerce, taxes property beyond the domain of the state and, in all cases where, as here, but a small sum per share has been received for the issued non-par shares, imposes a tax bearing no relation whatever to the value of the privilege for which the charge is made, and is so ruthless, exorbitant and confiscatory as to shock one's conception of right and justice.

Respectfully submitted,

GUY A. THOMPSON,
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Solicitors for Appellant.

APPENDIX A.

Corporation Annual Franchise Tax Law

(omitting unnecessary sections).

(Rev. St. Mo. 1919, Secs. 9836 to 9848, incl., as Amended Laws 1921, Ex. Session, pp. 122-126.)

Sec. 9836. **Annual Franchise Tax.**—Every corporation organized under the laws of this state, shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. **Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the**

purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located: Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their gross premium receipts in this state: Provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this act. If this provision, exempting bank deposits shall be declared unconstitutional by the courts, then the Legislature hereby declares that it is the intention that the remainder of this act shall be in full force and effect and further declaring that it would have passed this act, irrespective of the said exempting provision (Laws 1921, Ex. Session, p. 122). (Emphasis ours.)

Sec. 9837. **Corporations to Make Report, to Whom—When—To Contain What.**—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equalization annually on or before the first day of March, in such form as said Commission or said Board of Equaliza-

tion may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.
3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and post office address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.
6. The amount of capital stock issued and outstanding.
7. The amount of capital stock paid up.
8. The par value of the stock.
9. The clear market value of the stock.
10. The amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.
11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
12. The clear market value of its property and assets in this state.
13. The clear market value of its property and assets without this state.
14. The clear market value of its total property and assets.
15. The amount of liabilities.

16. The change or changes, if any, in the above particulars made since the last annual report (Laws 1921, Ex. Session, p. 123).

Sec. 9838. **State Tax Commission to Determine Amount —State Auditor to Make Tax Bills, When—Taxes, When Due, Etc.**—The State Tax Commission, or the State Board of Equalization, as the case may be, shall, on or before the 20th day of March in each year, determine from the facts reported, and from any facts within or coming to its knowledge the proportion of the capital stock and surplus of each corporation employed in business in this state and the amount of tax each corporation is liable to pay under the provision of this article and shall report the same to the State Auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of May in each year and shall be due and payable to the State Treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December (Laws 1921, Ex. Session, p. 123).

Sec. 9842. **Taxes, to Be a Lien.**—The taxes and penalties to be paid by the provisions of this article shall be a first lien on all property and assets of the corporation within this state (Laws 1917, p. 237).

Sec. 9843. **Delinquents—How Collected—Penalty.**—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this article on or before the first day of June the State Treasurer shall certify a list of such corporations so delinquent to the Attorney-General, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all property and assets of the corporation within this state (Laws 1921, Ex. Session, p. 125).

Sec. 9848. **Failure of Commission—State Board of Equalization to act.**—In the event that the State Tax Commission is not created or in existence all the powers and duties of such Commission under the provisions of this article shall devolve upon and be exercised and performed by the State Board of Equalization, and in such event the State Board of Equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this law (Laws 1917, p. 237).

APPENDIX B.

Stock Corporation Act (Laws Mo. 1921, pp. 661-666).

(Caption.)

An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger, or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner.

Act.

Section 1. **Stock corporations, other than building and loan associations, trust companies, etc.—shares, par value—capital.**—Upon the formation or reorganization, under the laws of this state from time to time in force, of any stock corporation, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, or upon the merger or consolidation of two or more such corporations of this state with each other or any one or more of such corporations of this state with one or more such corporations of another state or states or of the United

States, provision may be made for the issue of shares of preferred stock of any or all classes, or common stock of any class, or both preferred and common stock, without any nominal or par value, by stating in the articles of association or certificate of incorporation or reorganization or in the joint agreement of merger or consolidation, in lieu of statements which may be prescribed by law as to the amount of the capital stock and the number and par value of shares into which it is divided:

(a) The number of shares with nominal or par value, and the number of shares without nominal or par value, that may be issued by the corporation, and the classes, if any, into which such shares are divided;

(b) The nominal or par value of shares of stock other than shares which it is stated are to have no nominal or par value;

(c) The amount of capital with which the corporation will begin business.

Sec. 2. **Amount of capital stock shall be fully paid in.**—No corporation authorized to issue shares of stock without nominal or par value in pursuance of the provisions of this act shall begin to carry on business, or shall incur any indebtedness, until the amount of the capital with which it will begin business stated in pursuance of section 1 of this act, shall have been fully paid in cash or in property.

Sec. 3. **Stated capital shall not include net profits or surplus earnings.**—For the purposes of this act the stated

capital (as that term is hereinafter used in this act) of a corporation issuing shares without nominal or par value shall be the capital with which the corporation will begin business increased by any net additions thereto, or diminished by any net deductions therefrom; but stated capital shall not include any net profits or surplus earnings until transferred to capital, and shall not be larger in amount than the excess, as shown by the books of the corporation, of its assets over and above its liabilities, other than liabilities on account of shares of stock issued or to be issued by such corporation. In the case of a corporation having outstanding shares with a nominal or par value, as well as shares without a nominal or par value, for the purpose of this act the portion of stated capital applicable to the shares without a nominal or par value shall be the excess of stated capital over and above the total par value of outstanding shares having a nominal or par value.

Sec. 4. **May be stated in dollars or cents per share.**—Preferences, rights, limitations, privileges, and restrictions may be stated in dollars or cents per share in respect to shares of stock issued in pursuance of the provisions of this act.

Sec. 5. **Authorized shares may be issued, when.**—Such corporation may issue and may dispose of its authorized shares having no nominal or par value, from time to time, for such consideration as may be prescribed or authorized in the articles of association or certificate of incorporation

or reorganization or the joint agreement of merger or consolidation, or, if not so prescribed, then for such consideration as may be fixed by the stockholders of such corporation at any annual meeting thereof or at any special meeting thereof duly called and held or by the board of directors acting under authority of such stockholders given in like manner.

Sec. 6. **Shares shall be deemed fully paid and nonassessable.**—Any and all shares without nominal or par value, issued for the consideration as prescribed or fixed in accordance with the provisions of section 5 of this act, shall be deemed fully paid and be nonassessable, and the holder of **such** shares shall not be liable thereon to the corporation or to its creditors.

Sec. 7. **Certificate shall plainly state, what.**—Every certificate for shares of stock without any nominal or par value shall have plainly stated upon its face the number of shares which it represents, and no certificate shall express any par value for such shares or any rate of dividend to which such shares shall be entitled in terms of percentage of any par or other value.

Sec. 8. **Dividends to be paid out of net profits and surplus earnings.**—No corporation having shares without nominal or par value, issued under the provisions of this act, shall declare or pay any dividend out of capital or out of anything except net profits or surplus earnings. In case any such dividends shall be declared or paid other

than from net profits or surplus earnings, the directors voting for such dividend shall be liable, jointly and severally, to such corporation, and to the creditors thereof, to the full amount by which such dividend shall have been paid out of capital.

Sec. 9. **Par value of shares to be stated.**—In any case in which it is otherwise required by law that the par value of the shares of a corporation be stated, but the shares of such corporation of any class are without nominal or par value, there shall be stated in lieu thereof in respect of such shares that such shares of such class are without par value; and when in any case the maximum or minimum amount of the capital stock of a corporation and its division into shares is required to be stated, but the shares of such corporation or any class are without nominal or par value, there shall be stated in lieu thereof the maximum or minimum amount of the capital stock of the corpoartion represented by shares having a par value and the division thereof into shares and the maximum and minimum number of shares without nominal or par value and that such shares are without par value. In any case, in which it is required by law that any action on the part of a corporation may be taken only with the authorization, consent or approval of its stockholders holding a specified amount or a specific fraction in amount of its capital stock, a share without nominal or par value shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.

Sec. 10. **Corporation may increase or reduce number of shares.**—Any corporation having shares without any nominal or par value in pursuance of this act, may increase or reduce the number of shares which it may issue, in the manner now provided by law for the increase or reduction of the capital stock of a similar corporation having shares with a par value.

Sec. 11. **Shares of stock to be deemed part of aggregate capital of corporation.**—Except as to any preferences, rights, limitations, privileges and restrictions, lawfully granted or imposed with respect to any stock or class thereof, shares of stock without nominal or par value shall be deemed to be an aliquot part of the aggregate capital of the corporation issuing the same and equal to every other share of stock of the same class.

Sec. 12. **Taxes to be paid—how computed.—For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.** For the purpose of any report, return, or similar instrument

wherein the amount or par value of stock or capital or capital stock, paid in, outstanding, or retired, is required to be stated, in the case of shares without nominal or par value, and with respect to such shares, the amount or par value thereof, outstanding or paid in prior to the date of such report, return or similar instrument, shall be considered as the amount of stated capital in excess of the total par value of outstanding shares having a par value, if any, and the amount or par value thereof retired shall be considered as the amount of decrease, if any, of stated capital due to such retirement. In the case of shares without nominal or par value presently to be issued, in lieu of stating the amount or par value thereof in any such certificate, report, return, or similar instrument, a description of the consideration received or to be received therefor, or of the assets received or to be received for which the proceeds from the disposition of the said shares are to be used to pay or reimburse the treasury of the company, and the net changes, if any, in the corporations' stated capital, due to the receipt of such consideration, shall be stated. In the case of shares without nominal or par value authorized but unissued and not presently to be issued, it shall not be necessary, in such report, return, or similar instrument, to show the amount or par value thereof, and only the number thereof need be stated. For the purpose of any statutory provision limiting the amount of capital stock which a corporation may have, or prescribing the portion or amount or par value of stock

or capital which must be subscribed or paid in cash or otherwise, whether at the time of formation, before commencing to do business, or from time to time subsequent thereto, the stated capital of a corporation having shares without nominal or par value, shall be deemed to be its capital stock or the amount thereof. Nothing in this act contained shall be construed as excepting or relieving a corporation from any requirement of law as to the amount in dollars of subscribed or paid-in capital, in cash or otherwise, which it must have at any time. In any investigation or proceeding to determine the value of the property, assets, or capital stock of a corporation having shares without nominal or par value under the provisions of this act, neither the stated capital of such corporation nor the number of shares of its outstanding stock without nominal or par value shall be controlling, but the same may be disregarded, or considered only to such extent as shall be necessary or proper for the purpose of such investigation or proceeding. (Emphasis ours.)

Sec. 13. **Laws applicable to corporation provided by act.**—Except as otherwise provided by this act, corporations issuing shares without any nominal or par value, under the provisions hereof, shall be and remain subject to the laws of this state, now or hereafter in force, relating to the formation, regulation, reorganization, consolidation, or merger, rights, powers, and privileges of such corporations, and all other laws applicable thereto.

Sec. 14. **Acts or parts of acts inconsistent repealed.**—All acts or parts of acts providing for the incorporation, organization, administration and management of the affairs of corporations or otherwise, and inconsistent with this act, are, as respects corporations having shares without nominal or par value, hereby repealed, but all such acts or parts of acts are in all other respects, as respects corporations having shares without nominal or par value, expressly continued in full force and effect.

Sec. 15. **Act does not limit jurisdiction of Public Service Commission.**—Nothing in this act shall be construed in any way to limit the jurisdiction of the Public Service Commission under the Public Service Commission Act over the issue by public utilities of shares of stock without nominal or par value pursuant to this act.

Approved April 12, 1921.

FILED
JUN 3 19
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY,
Appellant,

vs.

STRATTON SHARTEL,
Attorney-General, et al.,
Appellees.

No. 579.

PETITION OF INTERNATIONAL SHOE COMPANY FOR REHEARING.

GUY A. THOMPSON,
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CASES CITED.

	Page
Airway Co. v. Day, 226 U. S., l. c. 85	8, 13, 14, 19
City of Carthage v. Rhodes, 101 Mo. 175	11
Cooley on Taxation, Sec. 125, p. 293	12
Doyle v. Continental Ins. Co., 94 U. S. 535	18
Ex parte Smith, 251 Mo. 111	12
Farrington v. Tennessee, 95 U. S., l. c. 686	14
Hanover Fire Ins. Co. v. Harding, 272 U. S. 494	19
Horn v. Silver Mining Co. of New York, 143 U. S. 305	18
International Paper Co. v. Mass., 246 U. S. 135	8, 13, 18
Kansas City, F. S. & M. R. Co. v. Botkin, 240 U. S. 227, l. c. 231	8
Looney v. Crane, 245 U. S. 178	8, 13, 18
Marquette Hotel Co. v. State, 282 Mo. 213	4
Minnesota v. Barber, 136 U. S. 113	8
Ohio Tax Cases, 232 U. S. 576	8
Pierce City v. Hentachell, 210 S. W. 31	12
Postal Telegraph and Cable Co. v. Adams, 155 U. S. 688	8, 12
St. Louis S. W. Railway Co. v. Arkansas, 235 U. S. 350	8
Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246	18
Southern Railway v. Green, 216 U. S., l. c. 417-418	14, 16
State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261	9, 16
State ex rel. Williams, 284 Mo. 456	4
State v. Ashbrook, 154 Mo. 375	11
State v. Freehold Inv. Co., 305 Mo. 88	4, 15
State v. Tax Commission, 282 Mo., l. c. 224	5, 7
Terrall v. Burke Construction Co., 257 U. S. 529	19
Union Tank Line Co. v. Wright, 249 U. S., l. c. 282	18
Western Union Telegraph Co. v. Kansas, 216 U. S. 1.	8

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PETITION OF INTERNATIONAL SHOE COMPANY FOR REHEARING.

The International Shoe Company, appellant, files this, its petition for rehearing, and presents the following:

1. This Court is in error in its opinion in stating "that the decision in the Pierce case in effect fixes the rate of taxation at 5 cents on each share of non-par stock employed within the state, regardless of its actual value."

The tax under the Missouri law is not a tax upon shares, but is a tax of one-twentieth of one per cent of the par

value of outstanding capital stock and surplus employed in business within the state. Unlike other franchise tax statutes heretofore construed by this Court, THE TAX HERE is based on outstanding **capital stock and surplus**. The tax on the outstanding capital stock arbitrarily fixed at $100.00 per share is one-twentieth of one per cent; the tax on the surplus is one-twentieth of one per cent, and it is not, either actually or in effect, "5 cents per share on the non-par stock employed within the state," because surplus is taxable as well as capital stock.

The Missouri Supreme Court, in the Pierce case, says (2 S. W. [2d], l. c. 794):

> "It (the statute) provides with respect to the first (par corporations) that the stock shall be computed on the par value of the capital stock **and surplus**; with respect to the second (non-par corporations), that it shall be computed on an arbitrary valuation of $100.00 per share **and** surplus." (Emphasis ours.)

This is quite different from a tax "of 5 cents per share on each share of non-par stock employed within the state."

2. The Court erred in its opinion in holding that: "The market value of appellant's stock does not appear and no foundation is laid for assailing the tax as so excessive as to be a denial of due process."

The bill of complaint sets forth its return filed with the State Tax Commission. The return recites (Rec., pp. 7-8):

"6. Capital stock issued and outstanding $46,082,631.09
12. Clear market value of property and assets in State of Missouri..... $52,956,249.12
13. Clear market value of property and assets without the State of Missouri $44,212,827.12
14. Clear market value of total property and assets..... $97,169,076.24"

The bill continues:

"The information contained in said report is true. It thus appears, and complainant avers the facts to be, that complainant has a total outstanding or paid-in capital stock, or stated capital, of $46,082,631.09, a surplus of $51,086,445.15, total property and assets of the value of $97,169,076.24, of which there are in the State of Missouri $52,956,249.12, or about fifty-four per cent (54%) of its total properties and assets" (Rec., p. 8).

The foregoing facts are admitted.

Thus the market value of appellant's assets in Missouri and outside Missouri **does** appear.

The value on the market of the "shares" of stock is of no consequence whatever. The statutes here in question do not even remotely refer to market value of shares of stock. The shares belong to the stockholders, and they alone are concerned with their market value. The market value is their property, not the corporation's. The

situs of all the shares of stock may be beyond the state, in which event, if the tax be based thereon, it is based on property beyond the limits of the state. The assets, the capital, belong to the corporation, and it is the assets that are used in its business, and their value that determine the tax, and not the market value of the shares of stock. The question is, what is the value of appellant's outstanding capital stock and surplus (property) actually used in its business in Missouri; **that value is admitted**, and is $52,956,249.12; that is all that is contemplated by the statute (Marquette Hotel Co. v. State, 282 Mo. 213; State ex rel. Williams, 284 Mo. 456; State v. Freehold Inv. Co., 305 Mo. 88). By applying the "basis or unit of measurement" of the Pierce Petroleum case, this admitted value is given a purely fictitious value of $208,000,000.00, with a resultant tax of $104,000.00. Clearly, this is confiscation, a taking of property without due process.

3. Further, the tax is confiscatory and denies appellant due process, because:

The Supreme Court of Missouri in the Pierce Petroleum case holds that the Stock Corporation Act relates only to domestic corporations, and that in section 12 it in effect supplements and amends Section 9836 of the Franchise Tax Law as to **domestic** non-par corporations organized under that act. It concludes that since the act thus relates to domestic corporations, "preferential treatment" would be given to foreign non-par corporations if they

should not be required to pay taxes on the same basis; and, therefore, not because the act so provides, but to avoid "preferential treatment" the Court held that its provisions in this respect should be applied to foreign non-par corporations. In other words, **there is no statute in Missouri which requires that the stock of foreign non-par corporations shall be given a value of $100.00 per share for franchise tax purposes.** The tax in this case has been assessed on the basis complained of because the statute required it to be so assessed in the cases of **domestic** non-par corporations. Clearly, to impose a tax without any statutory warrant to do so is a taking of property without due process.

4. The Court erred in holding that, for the reasons set forth in No. 601, New York v. Latrobe, equal protection of the laws was not denied.

(a) The Missouri statute is not a tax at a flat rate per share when apportioned to assets within the state. But, as stated by the Supreme Court of Missouri, it "contemplates a tax upon the right to do business in accordance with the property actually used in the business" (State v. Tax Commission, 282 Mo., l. c. 224), and is one-twentieth of one per cent of the property (capital stock **and surplus**) **actually** used in its business in Missouri. Of course, assigning an arbitrary value of $100.00 per share to the non-par stock will never determine how much capital and surplus are **actually** used in the state, except in the almost

unheard of instance where the non-par stock has been issued at $100.00 per share.

(b) It is not "equally true of corporations having par-value stock" that their tax will "bear little relation to the property and business of the corporation within the state." The application of the Missouri formula (capital stock and surplus employed in the state equals percentage of property in the state to all property) to par-value corporations will always unerringly determine precisely the property actually used in its business in the state, save in the exceptional case where the corporation's total assets have fallen below the par value of its capital stock.

Usually the assets of a going corporation equal or exceed the par value of its capital stock. Rarely does a corporation's statement disclose assets less than its capital stock. When a corporation's assets have fallen below its capital stock one of two things generally occurs, and occurs quickly. Either it fails and passes off the commercial stage, or it rehabilitates itself and builds up its assets to or above its capital stock. It is a fair presumption, therefore, that the assets of a going corporation equal the par value of its capital stock, whether that par value be $100.00 or $50.00 or $5.00 a share, and, therefore, the application of the Missouri formula to them generally yields a tax based upon the property actually used in business in the state.

But there is no presumption whatever that the assets of a non-par stock corporation equal its stock at $100.00 per

share. On the contrary, the presumption is that they do not. Indeed, one of the purposes, and perhaps the chief purpose, of non-par stock is to enable the corporation to sell it for varying sums below, and usually far below, $100.00 per share. To give it a value of $100.00 per share for the purpose of assessing the Missouri Franchise Tax will never determine the property actually used by it in its business in the state, save in the extremely exceptional case (if there be one) where the company has issued its non-par stock for $100.00 per share. It follows that giving an arbitrary value of $100.00 per share to stock of a non-par corporation, and then applying the Missouri formula, yields a tax that bears no relation whatever to the property used by the corporation in its business in the state, and necessarily denies such corporations, as between themselves, the equal protection of the law.

(c) The "kind and number of shares with which a foreign corporation is permitted to carry on its business" is a privilege granted to it by the state of its incorporation. If this privilege may be taxed by the State of Missouri, it may be destroyed by the State of Missouri. It is not, therefore, "a proper element" to be taken into account in fixing a tax on the privilege of doing business within the state. Furthermore, section 9836 does not contemplate the inclusion of such privilege as an element to be taken into account in fixing the tax. The tax is to be measured "in accordance with the property actually used in the business in the state" (State v. Tax Commission, 282 Mo., l. c. 224).

As here construed, "the act has no tendency to produce equality, and it is of such a character that there is no reasonable presumption that substantial equality will result from its application" (Airway Co. v. Day, 226 U. S., l. c. 85).

5. The Court erred in holding that "the tax is a privilege and not a property tax," and, therefore, that it "does not operate to tax property or business without the state."

This Court has frequently held that "the substance and not the shadow" determines the character of the tax (Postal Telegraph and Cable Co. v. Adams, 155 U. S. 688), and that, whether the imposition is an excise or a tax on property beyond the jurisdiction, "is determined by its **effect** and **necessary operation**" (Western Union Telegraph Company v. Kansas, 216 U. S. 1; Minnesota v. Barber, 136 U. S. 113; St. Louis S. W. Railway Co. v. Arkansas, 235 U. S. 350; Kansas City, F. S. & M. R. Co. v. Botkin, 240 U. S. 227, l. c. 231; Ohio Tax Cases, 232 U. S. 576; Looney v. Crane, 245 U. S. 178; International Paper Co. v. Mass., 246 U. S. 135; Airway Elec. Appliance Corporation v. Day, 266 U. S. 71). It is not what the statute or the formula says, but what it does that determines the character and validity of the tax.

Though this tax be called a franchise tax, its **effect** and **necessary operation** is to tax $208,000,000.00, arbitrarily and fictitiously assumed to be appellant's capital stock and surplus used in Missouri, one-twentieth of 1 per cent,

though in truth and in fact, and as is **admitted**, appellant uses in Missouri but $52,000,000.00 of outstanding capital stock and surplus. If, to the extent that it is a tax upon the excess beyond the property actually used in Missouri, it is not in **effect** and **practical operation** a tax on appellant's $44,000,000.00 of property beyond Missouri, then we are unable to understand what would constitute a tax upon that extraterritorial property.

6. It is presumed that when the Legislature of a given state legislates it has in mind the construction of that law by its Supreme Court, and, if that law is to be amended, that the Legislature will have in mind the particulars in which the law should be amended or referred to in order that the Legislature and the public may know it is being amended. The Supreme Court of Missouri, in the case of State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261, held that Sections 9836 and 9838 of the Missouri Franchise Tax Law applied to foreign corporations having shares of no-par stock, and that they could be taxed in conformity with the existing law. The Stock Corporation Act passed in 1921 was solely in reference to the formation of domestic corporations in the State of Missouri with no-par shares. In its title it did not purport to amend, in any particular, any law or franchise tax as to foreign corporations, and the Supreme Court of Missouri in its decision in the Pierce case (2nd S. W. [2d], l. c. 795) does not suggest that the law as amended applied to foreign corporations, but says:

> "The very act (i. e., the Non-Par Stock Act) which authorizes a domestic corporation to issue shares of stock without nominal or par value provides that every such share shall be considered the equivalent of a share having a par value of one hundred dollars for the purpose of computing the annual franchise tax. In accepting the privileges granted such a corporation voluntarily assumes the burden imposed."

This relates solely to **domestic** corporations, but the Court goes further and says:

> "And, of course, a corporation of another state desiring to do business in this state is not entitled to preferential treatment in that respect."

The Court thus admits that section 12 did not amend section 9836 as to **foreign** corporations. When the Court does apply a domestic law to a foreign corporation it is then going into the legislative field rather than judicial, and when the caption of the act does not show that the subject legislated upon by the Court is covered, the act certainly is subject to constitutional objection that the title does not cover the field legislated upon.

7. The Supreme Court of Missouri in the Pierce case holds that the Stock Corporation Act relates only to domestic corporations, and that in section 12 it, in effect, amends Section 9836 of the Franchise Tax Law as to **domestic** non-par corporations organized under the said Stock Corporation Act. It concludes that since the act

thus relates to **domestic** corporations "preferential treatment" would be given foreign corporations if they should not be required to pay taxes on the same basis and, therefore, not because the act so provides, but to avoid "preferential treatment" the Court held that section 12 should be applied to foreign non-par corporations. Since, therefore, the act does not relate to **foreign** corporations, its title cannot relate to foreign corporations, and if section 12 is to be arbitrarily applied to foreign corporations then we are applying the act in a manner not contemplated or expressed in the title, in violation of Article IV, Section 28 of the Missouri Constitution.

8. The title to the Stock Corporation Act is not general in its terms; it goes into specific details and attempts to state with particularity as to what the bill is intended to cover and include, making provision for the formation, reorganization, merger or consolidation of corporations, for the issuance of either or both preferred or common shares without nominal or par value, regulating the same and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner. The word "regulate" has been defined in the State of Missouri, and it does not include or cover a tax for revenue purposes.

State v. Ashbrook, 154 Mo. 375;
City of Carthage v. Rhodes, 101 Mo. 175;

Pierce City v. Hentachell, 210 S. W. 31;
Ex parte Smith, 251 Mo. 111;
Cooley on Taxation, Sec. 125, p. 293;
Postal Telegraph-Cable Co. v. Adams, 155 U. S. 688.

That the title of the act does not clearly indicate the subject—that is, an intent to amend the Franchise Act—is evidenced by the fact that the taxing authorities of the State of Missouri for six years did not discover that the act applied or was intended to apply to the annual franchise tax to be paid by either domestic or foreign corporations.

9. Even in states where the franchise tax laws impose the tax only on capital stock a wide difference or inequality results from applying an arbitrary value to nonpar-value shares, and at the same time applying to par-value shares the amount received for such shares by the corporation, because $100 per share is now seldom the par value of such shares and is not the amount received by the corporation for par-value shares, and unless $100 per share be received for both classes of shares inequality inevitably will always result. In Missouri surplus must be included as a basis for the tax, so that on nonpar-value shares the result is a greater inequality.

10. Different fees or charges may be imposed for a privilege based on classification of subjects, but where the basis of the charge is money value, either of capital stock and surplus or property, there can be no justification for valuing a dime at a dollar under the guise of classification

—the result is confiscation and a taking of property without due process.

11. The assignment to non-par shares of an arbitrary value of $100.00 each, and multiplying the number of shares by $100.00, gives to the outstanding capital stock so determined a value many times its par value. In this case ten times its true value. As surplus used in Missouri must be included, capital and surplus is valued at more than four times the par value of the entire outstanding capital and surplus of appellant corporation; hence, of necessity, it results in a tax upon appellant's property beyond the State of Missouri. This arbitrary valuation of outstanding capital stock and surplus results in a greater tax on appellant than a tax based on its entire outstanding capital stock and surplus, which method of taxation was condemned in the case of Looney v. Crane, 245 U. S. 178. In that case the annual franchise tax was based on outstanding capital stock and surplus, and the qualification tax was based on authorized capital stock and surplus. As all authorized stock was issued the question of unissued stock was not presented, but this Court held both taxes unconstitutional. The effect of the decision in the instant case is to overrule Looney v. Crane, International Paper Co. v. Massachusetts, 246 U. S. 135, and Airway Co. v. Day, 266 U. S. 71.

12. It has been decided by this Court that the only privilege granted a foreign corporation by a state when it is permitted to do business within that state is the privilege of doing the business authorized by its Articles of Incorporation, and that an annual franchise tax for this privilege must bear some relation to the privilege granted (Airway Elec. Appliance Corp. v. Day, 266 U. S. 71.

No added charge can be made for being a corporation, or for the right to issue shares of stock without par value, or for the number of shares issued; for those powers were granted by the state of its incorporation (Southern Railway v. Green, 216 U. S., l. c. 417-418; Airway Co. v. Day, 266 U. S., l. c. 83).

The number of no-par value shares is not an indication, and does not purport to be a representation as to the amount of its capital (Airway Elec. App. Co. v. Day, 266 U. S., l. c. 83).

13. The capital stock and shares of the capital stock are distinct things. The outstanding capital stock of a corporation belongs to the corporation, whether it is paid in money, property or labor; it is the amount received for the shares of stock issued, and is a fixed and definite amount set up on the books of the corporation (and is required to be set up under the laws of the state of its incorporation). It is neither increased nor diminished by losses or gains made by the corporation (Farrington v. Tennessee, 95 U. S., l. c. 686). This is true of corpora-

tions having no-par value shares and those having par value shares. The capital stock and surplus is used by the corporation in its business. The shares of stock issued are not used; they belong to the stockholders and represent the ownership by the holders of an aliquot part of the corporate assets after debts are paid. The market value of shares is the value of the stockholders' property, not the corporation's. No corporation can pay dividends out of capital stock, whether its shares have a stated par value or no stated par value.

The liability for unpaid subscriptions on par-value shares and no-par-value shares is exactly the same; there is no distinction. In each instance it represents the difference between the amount actually paid on the shares and the value or amount agreed to be paid at the time of subscription or sale by the corporation; it is definitely established by the contract of subscription or purchase. No foreign state, by franchise tax law, can increase or diminish this liability.

14. There is no difficulty, according to the Supreme Court of Missouri, in determining the franchise tax on a no-par-value corporation, because its books and reports reflect the total amount of the par value of its outstanding capital stock and its surplus, and the total amount of its investment in Missouri, so that there can always be apportioned to the state a proper amount as a basis for taxation (State v. Freehold Investment Co., 305 Mo. 88;

State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261). Therefore, since the Missouri statute imposes the tax on surplus, as well as capital, and since these amounts are always definitely fixed and ascertainable, there is no necessity nor justification for arbitrary classification or valuation.

15. Classification may be made for the purpose of taxation, either excise or ad valorem, but such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the classification imposed, and arbitrary selection cannot be justified by calling it classification (Southern Railway Co. v. Green, 216 U. S., l. c. 417-418).

16. It is not a reasonable classification to divide foreign corporations for annual franchise tax fees into two general classes; one, those whose shares have a stated par value and base the tax on par value of outstanding capital stock; the other, those whose shares have no stated par value, and arrive at par value of capital stock, for franchise taxes, by multiplying the issued number of shares by $100.00 per share, irrespective of the outstanding capital stock or the amount paid for the shares of stock, because if that be done the tax is not measured by the real outstanding capital stock and surplus justly apportioned to the state.

17. It is no more arbitrary and confiscatory to fix the franchise fees for foreign corporations whose corporate

names begin with the letter "C" at double the amount which shall be paid by corporations whose corporate names begin with the letter "A" for the privilege of doing business in a given state, than it is to say that the capital stock of a foreign corporation which issued shares having a stated par value shall be the basis on which a franchise tax is charged, irrespective of the number of shares issued by it, and then say that the number of shares of a corporation which issued shares having no stated par value, multiplied by $100.00, shall be its outstanding capital stock and the basis of its franchise tax, when such arbitrarily fixed capital stock is nine times its actual outstanding capital stock and four times its capital stock and surplus, and yet that is the situation here.

18. A state which grants foreign corporations the privilege of doing business within its borders grants the same and no greater privilege to every foreign corporation, irrespective of whether its capital stock is represented by shares of a stated par value or no par value. It can grant no corporate powers to either corporation as to the kind or number of shares issued or to be issued. It can refuse foreign corporations the privilege of doing business within its borders, but, when the privilege is granted, then it cannot arbitrarily discriminate and charge different amounts for this privilege, because one corporation is incorporated under the laws of Delaware and another is incorporated under the laws of Pennsylvania, and any discrimination

between foreign corporations issuing par-value shares and those issuing no-par-value shares for the privilege of doing business in a state, based on a valuation of its capital stock and surplus at four times its actual amount, is arbitrary, confiscatory, and taxes property beyond the state, deprives the corporation of property without due process of law, and deprives it of equal protection of the law, and violates the Fourteenth Amendment to the Constitution.

19. Any measure or basis of taxation, whether excise or ad valorem, which values property, whether it be the outstanding capital stock and surplus or real estate, of a corporation at more than four times its admitted actual value is not classification but confiscation, and is a denial of the equal-protection and due-process clause of the Fourteenth Amendment to the United States Constitution.

Union Tank Line Co. v. Wright, 249 U. S., l. c. 282.

20. This Court at one time held that a state could impose any exaction it saw fit on a foreign corporation for the privilege of doing business within the state.

Horn v. Silver Mining Co. of New York, 143 U. S. 305;
Doyle v. Continental Ins. Co., 94 U. S. 535;
Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246.

But this holding was thereafter expressly overruled in:

Looney v. Crane, 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;

Terrall v. Burke Construction Co., 257 U. S. 529;
Hanover Fire Ins. Co. v. Harding, 272 U. S. 494;
Air-Way Co. v. Day, 266 U. S. 71,

in each of which cases it was held that the exaction was subject to the rights granted by the Constitution of the United States and the Fourteenth Amendment thereto.

21. Counsel for appellant apologize for the length of this motion, but they have earnestly endeavored to present clearly their reasons for believing that the decision of this Court is erroneous, and to show that the decision is in conflict with legal principles heretofore clearly and definitely established. In presentation of the case on oral argument counsel's time was so limited and so largely taken up in answering questions propounded by the Court that it was not possible to present these reasons, which they were prepared to do.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

GUY A. THOMPSON,
FRANK A. THOMPSON,
JAMES D. WILLIAMSON,
R. E. BLAKE,
Counsel for International Shoe Company.

I, James D. Williamson, counsel for the above-named International Shoe Company, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

James D. Williamson,
Counsel for International Shoe Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

INTERNATIONAL SHOE COMPANY, Appellant, vs. STRATTON SHARTEL, Attorney-General, et al., Respondents.	No. 579. October Term, 1928.

MOTION OF INTERNATIONAL SHOE COMPANY TO FILE SUPPLEMENT TO PETITION FOR REHEARING.

International Shoe Company, appellant, respectfully represents:

That there is an irreconcilable conflict between the opinion in this case and the opinion in the case of MacAllen v. Massachusetts, decided by this Court May 27, 1929, which was after the petition for rehearing in this case was prepared, and appellant asks leave to file this, its supplement to its motion for rehearing, and presents as an additional

ground for rehearing the conflict between the two decisions, and respectfully submits the following:

1. In the case of International Shoe Company v. Shartel et al., this Court held,—that the annual franchise tax imposed by the State of Missouri upon appellant was a privilege (excise) and not a property tax, and giving the shares a specified value ($100.00 per share) by which the tax is measured, only affects the rate of tax on the privilege and does not operate to tax property or business without the state, deny it equal protection of the laws or take its property without due process. The effect of the statute, as construed, is to tax appellant on four times the admitted par value of its capital stock and surplus employed in Missouri, or tax appellant's capital stock and surplus employed in Missouri at a rate of four-twentieths of 1 per cent, which is four times the fixed statutory rate.

It will thus be seen that the Court held **that even though the effect of the tax statute is to levy the tax on $208,440,000.00** as the par value of its capital stock and surplus employed in Missouri, which is **four times the admitted par value** ($52,956,249.12)—**or at a rate of four-twentieths** of 1 per cent, **which is four times the statutory rate** (one-twentieth of 1 per cent)—**the statute is not in violation of the constitutional inhibition** against taxing property beyond the state, denying equal protection of the laws, or taking property without due process, **because the tax is an excise or privilege tax.**

2. This Court, in the case of MacAllen Company v. Massachusetts, held,—that though the tax under consideration was called an excise tax, and was levied on domestic corporations for the privilege of doing business within the state, measured by their net income, that **the effect of the statute was to tax interest on United States Bonds** and interest on the State Bonds of the State of Massachusetts which were, under its Constitution, exempt from taxation, and **for that reason was void because, in effect, it violated the Constitution** of the United States and of Massachusetts; and that what a tax is called does not determine its constitutionality, but what the tax does, its nature and effect, is the test. The Court reaffirmed its holding in the cases of Choctaw, Oklahoma, Ry. Co. v. Harrison, 235 U. S. 292, and G. H. & S. A. Ry. Co. v. Texas, 210 U. S. 217.

It will thus be seen that the Court held: **That if the effect of the excise or privilege tax is to tax property in violation of the Constitution, the statute is void—and it is not what the tax is called but its effect and practical operation that is to be considered,** and if in its application it violates the Constitution, it is void.

The two opinions cannot be reconciled, and we submit that the last decision, MacAllen v. Massachusetts, is based on sounder principle and longer established precedent and should be upheld, and the decision in this case set aside and a rehearing granted.

We respectfully ask that this supplement to the petition for rehearing be permitted to be filed and the error herein assigned be considered, in addition to those assigned in the petition for rehearing.

A copy of this motion has been delivered to counsel for appellees.

Respectfully submitted,

GUY A. THOMPSON,
FRANK A. THOMPSON,
JAMES D. WILLIAMSON,
R. E. BLAKE,
Counsel for Appellant.

I, James D. Williamson, counsel for the above-named International Shoe Company, do hereby certify that the foregoing supplement to the petition for rehearing in this cause is presented in good faith, and not for delay.

James D. Williamson,
Counsel for International Shoe Company.

FILED
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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

(No. 579, October Term, 1928.)

INTERNATIONAL SHOE COMPANY,
Appellant,

vs.

STRATTON SHARTEL, Attorney-General, et al.,
Appellees.

REPLY OF THE APPELLANT TO SUGGESTIONS OF APPELLEES IN OPPOSITION TO PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

(No. 579, October Term, 1928.)

INTERNATIONAL SHOE COMPANY,
Appellant,

vs.

STRATTON SHARTEL, Attorney-General, et al.,
Appellees.

REPLY OF THE APPELLANT TO SUGGESTIONS OF APPELLEES IN OPPOSITION TO PETITION FOR REHEARING.

The appellees in the above case have filed suggestions in opposition to appellant's petition for rehearing, and give three suggested reasons why the petition for rehearing should not be granted. These suggestions are as follows:

I.

That Section 12 of the Missouri Stock Corporation Act, passed by the General Assembly in 1921, applies to appel-

lant, a foreign corporation, as to franchise taxes, because of Section 9790, Revised Statutes of Missouri 1919.

II.

That the Missouri annual franchise tax is not a tax on property, but is a tax on the privilege of doing business in the state, and the tax amounts to five cents per share on the proportionate part of shares of non-par value stock used, in business in the state, by a foreign corporation.

III.

That no tax is computed on the surplus of a corporation having no par shares, because a corporation with no par shares can have no surplus.

We will answer the suggestions in their order.

First. Revised Statutes of Missouri, Section 9790, so far as it can be pertinent here, is as follows:

> "9790. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, re-

strictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

This statute has no reference whatever to taxation or franchise taxes. Such taxes are covered by specific legislation, and it is a familiar rule of statutory construction that, when there is a specific statute in reference to matters of taxation, that statute controls, rather than a general law.

The Supreme Court of Missouri, in the case of State v. Pierce Petroleum Co., admitted that section 12 did not apply to foreign corporations.

Second. The Missouri Annual Franchise Tax is admitted to be a tax for the privilege of doing business within the state. The law fixes the basis of the tax. It is based on that portion of the par value of the outstanding capital stock and surplus represented by the proportion of property and assets in the State of Missouri. That is taxed at the rate of one-twentieth of one per cent. The tax is both upon capital stock and surplus. It is based on par value. There is no hidden meaning in the words "par value." "Par" means "equal." The Courts have had occasion to define par value of capital stock. "It is the amount which has actually been paid in the treasury for the stock" (Commonwealth v. Lehigh Avenue R. R. Co., 129 Pa. State 405, l. c. 415-416).

"The capital stock and the shares of capital stock are distinct things. The capital stock is the money paid or

authorized or required to be paid in as a basis of the business and the means of conducting its operation. It represents whatever it may be invested in" (Farrington v. Tennessee, 95 U. S., l. c. 686).

The Missouri tax is based upon money value of outstanding capital stock and surplus, not on number of shares, nor on outstanding shares, nor the value of the shares.

Surplus is so well known that definition is unnecessary.

Third. The third suggestion is that a corporation having no par stock can have no surplus. How can this be true? How can undistributed earnings or profits, or paid-in surplus, become capital stock without express corporate action by which capital stock is increased? The laws of Delaware expressly provide that the directors shall determine the capital stock as to no par shares; in this case this has been done, and the appellees admit it. If earnings or profits automatically become capital stock, how can dividends be paid? The laws of both Delaware and Missouri prohibit the payment of dividends from capital stock.

To state the proposition answers it.

We submit the motion for rehearing is well founded and should be granted.

Respectfully submitted,

GUY A. THOMPSON,
FRANK A. THOMPSON,
JAMES D. WILLIAMSON,
R. E. BLAKE,
Counsel for Appellant.

SUBJECT INDEX

	Page
Statement of Facts	1
Summary of Argument	3
Argument	7
Conclusion	21
Opinion in Court below—International Shoe Company vs. Shartel, 29 Fed. (2nd) 604	2

CASES CITED.

Baltic Mining Company vs. Mass. 231 U. S. 68, 82-83	5-6, 14
Coca-Cola Bottling Company vs. Mosby, 289 Mo. 462-472	4, 12
Flint vs. Stone Tracy Company, 220 U. S. 107, 167	5
Home Insurance Company of New York vs. People, 134 U. S. 594, 599-600	5, 15
Hump Hairpin Company vs. Emmerson, 258 U. S. 290, 294-295	6
International Shoe Company vs. Shartel, 29 Fed. (2nd) 604-607	2-4, 19
Kansas City M. & B. R. Company vs. Stiles, 242 U. S. 111, 117-118	6
Kentucky Union Company vs. Kentucky, 219 U. S. 140, 151	5
Maine vs. The Grand Trunk Railway Company, 142 U. S. 217, 228-229	5, 14
Missouri Statute on No Par Stock—Title, Laws of Missouri 1921, 661	13
Postal Telegraph Cable Company vs. Adams, 155 U. S. 688, 700	6, 17
Roberts & Schaefer Company vs. Louis L. Emmerson 271 U. S. 50, 57	6, 18, 20
St. Louis-San Francisco Railway Company vs. Middelkamp, 256 U. S. 226, 231-232	3-5, 7, 16

	Page
St. Louis Southwestern Railway Company vs. Arkansas, 235 U. S. 350, 365	6
State ex rel. Dickason vs. County Court, 128 Mo. 427-441	4, 10
State vs. Mullinix, 301 Mo. 385-390	4, 10
State vs. Pierce Petroleum Corporation, 2 S. W. (2nd) 790-793	5, 7, 8
State vs. Sloan, 258 Mo. 305-313	4
State vs. Whitaker, 160 Mo. 59, 69-70	11
State ex inf. Barrett vs. Imhoff, 291 Mo. 603-619	4, 11
State ex rel. Attorney-General vs. Margay Oil Company, 169 Ark. 96, 270 S. W. 845, 269 S. W. 63, 273 U. S. 666	6, 19, 20
State ex rel. Marquette Hotel Investment Company vs. State Tax Commission, 282 Mo. 213	3-7
State ex rel. Missouri Pacific Railway Company vs. Danuser, 6 S. W. (2nd) 907	3-4, 7
State ex rel vs. Roach, 258 Mo. 541-559	4, 12
Constitution of Missouri, Section 28, Article 4	3
Laws of Missouri, 1921, page 664 (no par stock law)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 579.

INTERNATIONAL SHOE COMPANY, APPELLANT,

vs.

STRATTON SHARTEL, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, AND C. EUGENE STEPHENS, STATE TREASURER OF THE STATE OF MISSOURI, RESPONDENTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT OF RESPONDENTS.

STATEMENT.

This is an appeal from the District Court of the United States, Western District of Missouri. Complainant, the International Shoe Company, filed an application before the district court asking for an injunction against Stratton Shartel, Attorney-General of the State of Missouri, and C. E. Stephens, State Treasurer of the State of Missouri, to enjoin said officers from collecting the annual franchise tax assessed by the State of Missouri against complainant corporation.

For their grounds of relief complainant corporation set out that the no par value stock law of Missouri (R. 31) was unconstitutional and that the assessment of the tax under this statute was an interference with interstate commerce

and did not give complainant corporation due process of law.

Defendants filed an answer to the bill of complaint (R. 42), and the case came on for argument before the District Court of the Western District of Missouri, being heard by Judge Stone of the United States Circuit Court of Appeals of the Eighth Circuit, and Judge Reeves and Otis of the District Court of the Western District of Missouri.

On November 2, 1928, an opinion was rendered by the court, written by Judge Reeves and concurred in by Judges Stone and Otis, denying the writ of injunction prayed for, International Shoe Company vs. Shartel, 29 Fed (2nd) 604. The case was then appealed to this court.

SUMMARY OF ARGUMENT

I

THE FRANCHISE TAX ACT OF MISSOURI IS CONSTITUTIONAL

A

The regular franchise tax act of Missouri under which all franchise taxes are collected has been held by this court and the Missouri Supreme Court to be constitutional. All franchise taxes are assessed under this section. (R. 2324).

St. Louis-San Francisco Railway Company vs. Middelkamp, 256 U. S. 226, l. c. 231.

State ex rel. Marquette Hotel Investment Company vs. State Tax Commission, 282 Mo. 213.

State ex rel. Missouri Pacific Railway Company vs. Danuser, 6 S. W. (2nd) 907.

B

The Missouri franchise tax does not lay a tax against any stock other than that which is OUTSTANDING. No attempt has ever been made to tax stock which was merely authorized.

II

THE MISSOURI NO PAR STOCK LAW IS CONSTITUTIONAL AND THE TITLE IS GOOD

A

Section 28, Article 4, of the Constitution of Missouri provides as follows:

> "Section 28. BILLS MUST CONTAIN BUT ONE SUBJECT — EXCEPTIONS — TITLE.—No bill (except general appropriation bills, which may

embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of Section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

B

The title of an act passed by the Missouri Legislature must serve as a clear and comprehensive indicator of the purpose of the act, and is sufficient if the title does not mislead as to the chief topic of the act, when it sufficiently indicates the substantial purposes of the act it will not be violative of the constitution, and it is only necessary that the title indicate the subject of it in a general way without entering into detail.

State ex rel. Dickason vs. County Court, 128 Mo. l. c. 441.

State vs. Sloan, 258 Mo. l. c. 313.

State ex rel. vs. Roach, 258 Mo. l. c. 559.

Coca-Cola Bottling Company vs. Mosby, 289 Mo. l. c. 472.

State ex inf. Barrett vs. Imhoff, 291 Mo. l. c. 619.

State vs. Mullinix, 301 Mo. l. c. 396.

State ex rel. Missouri Pacific vs. Danuser, supra.

C.

This particular act in question and the title thereto has been held constitutional by a Federal Court composed of three judges.

International Shoe Company vs. Shartel, 29 Fed. (2nd) 694.

D

The Missouri Supreme Court has held that this act applies in arriving at the value of no par stock for the purpose of assessing the franchise tax.

State vs. Pierce Petroleum Corporation, 2 S. W. (2nd), 790.

III

THE METHOD OF COMPUTING THE FRANCHISE TAX IN MISSOURI DOES NOT DENY EQUAL PROTECTION OF THE LAW

A

The franchise tax act in Missouri does not become a property tax simply because it is assessed on capital stock and surplus. A state may use any method it desires as a means of arriving at the basis for assessing a franchise tax, and if the exaction in question does not tax property and does not attempt to regulate interstate commerce it is not unconstitutional merely because of the mode of its measurement.

St. Louis-San Francisco Railway Company vs. Middelkamp, 256 U. S. l. c. 231-232.

Maine vs. The Grand Trunk Railway Company, 142 U. S. l. c. 228-229.

Home Insurance Company of New York vs. People, 134 U. S. l. c. 599-600.

Flint vs. Stone Tracy Company, 220 U. S. 107, l. c. 167.

Baltic Mining Company vs. Commonwealth of Mass., 231 U. S. 68, l. c. 82-83.

Kentucky Union Company vs. Kentucky, 219 U. S. 140, l. c. 151.

The Missouri franchise tax law applies equally to both domestic and foreign corporations having stock of no par value, and is based on the proportionate part of its outstanding capital stock and surplus, that its property and assets in Missouri bear to all its property and assets wherever located.

IV

THE MISSOURI NO PAR LAW DOES NOT INTERFERE WITH INTERSTATE COMMERCE

A

A tax is not a regulation of interstate commerce merely because it is assessed upon and paid by a corporation which is engaged in interstate commerce.

Postal Telegraph Cable Company vs. Adams, 155 U. S. 688, l. c. 700.

Hump Hairpin Company vs. Emmerson, 258 U. S. 290, l. c. 294-295.

Baltic Mining Company vs. Mass., 231 U. S. 68, l. c. 82-83.

St. Louis Southwestern Railway Company vs. Arkansas, 235 U. S. 350, l. c. 365.

Kansas City M. & B. R. Company vs. Stiles, 242 U. S. 111, l. c. 117-118.

B

That a state may place a fixed value upon no par stock in a corporation for purposes of arriving at a state franchise tax has been decided by this court, and it is not an interference with interstate commerce.

Roberts & Schaefer Company vs. Louis L. Emmerson, 271 U. S. 50, l. c. 57.

State ex rel. Attorney-General vs. Margay Oil Company, 169 Arkansas 96, 272 S. W. 845.—269 S. W. 63.

Affirmed by this court: 273 U. S. 666.

ARGUMENT

I

THE FRANCHISE TAX ACT OF MISSOURI IS CONSTITUTIONAL

The franchise tax act of Missouri was passed in 1917. It was amended in 1921 and that act is in force today in Missouri as amended. The constitutionality of this act as originally passed was tested in the Missouri Supreme Court in the case of State ex rel. Marquette Hotel Investment Company vs. State Tax Commission, 218 Mo. 213. It was later carried to the Supreme Court of the United States and in the case of St. Louis-San Francisco Railway Company vs. Middelkamp, 256 U. S. 226, the act was held to be constitutional.

In 1928 this act as amended was again tested and held to be constitutional by the Supreme Court of Missouri, State ex rel Missouri Pacific Railway Company vs. Danuser, 6 S. W. (2nd) 907. A Writ of Certiorari to the Supreme Court of the United States was applied for but was denied on October 22, 1928. The above mentioned decisions unquestionably take away any question as to the constitutionality of the franchise tax act proper.

II

THE MISSOURI NO PAR STOCK LAW IS CONSTITUTIONAL AND THE TITLE IS GOOD

At the time the no par stock act was tested before the Supreme Court of Missouri in the case of State vs. Pierce Petroleum Corporation, 2 S. W. (2nd) 790, no mention was made as to the title of the act. This was an afterthought on the part of the various corporations, when the Missouri Supreme Court held the act to be constitutional.

The complainant corporation did, however, after the decision in the Pierce case, file an application for a Writ of Certiorari before the Supreme Court of Missouri setting out therein that the title to the act was bad. This application was denied.

When the opinion in the case of State vs. Pierce Petroleum Corporation was handed down by the Supreme Court of Missouri, Judge Ragland speaking for the court, 2 S. W. (2nd) 793, had this to say relative to Section 12 of said act, which is the particular section now under dispute:

> "Deleting the portion of the provision which for the purpose in hand has no relevancy, and transposing some of its language, we have:
>
> " 'Each share of stock without any nominal or par value, under the provisions of this act (that is, a share of stock without nominal or par value within the meaning and purview of the act) shall be considered the equivalent of a share having a nominal or par value of one hundred dollars—for the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock, and not on the number of shares or the actual or ascertained value thereof.'
>
> "There is no dispute as to what is meant by 'organization taxes required to be paid under the laws of this state.' Respondent concedes that the language refers to the fee, graduated according to the amount of capital stock, required of a domestic corporation at the time of filing its articles of association, as provided by section 9735, R. S. 1919, and the fee required of a foreign corporation, on its application to be licensed to do business in this state, based on the proportion of its capital stock represented by its property and business in the state,

as provided by section 9792, R. S. 1919. In construing 'such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof,' it is insisted that under the rule of ejusdum generis this language must be construed as meaning taxes of the same kind as 'organization taxes.' But, even so, the statute itself defines the class. And this is the class:

" 'Such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof.'

" 'Organization taxes' fall within that class. In addition to those taxes there was at the time of the passage of the act in 1921, and there is now so far as we are advised, but one other corporation tax (not mere fee) falling within the class, namely, the annual franchise tax imposed by Section 9836, R. S. 1919. According to that section:

" 'Every corporation organized under the laws of this state shall * * * pay an annual franchise tax * * * equal to one-tenth of one per cent, of the par value of its outstanding capital stock and surplus. * * * Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax * * * equal to one-tenth of one per cent of the par value of its capital stock and surplus employed in business in this state.'

"This section as amended in 1921 (Laws Ex. Sess. 1921, p. 122, sec. 1) as to rate and in certain minor particulars is still in force. It thus conclusively appears that the annual franchise tax is of the same kind as 'organization taxes.' Both are franchise taxes and both are assessed on the basis of 'the par value of shares of stock and not on the

> number of shares or the actual or ascertained value thereof.' We think there can be no doubt therefore but that the Legislature in employing the language under construction had in mind the annual franchise tax imposed upon corporations under said Section 9826."

When the present case was argued in Kansas City before a three judge Federal Court the title was taken up, and argued before three judges, all of whom were from Missouri and acquainted with the Missouri laws, and the requirements of titles to acts. Judge Reeves, who wrote the opinion in this case, and held that the title was good, was formerly a Commissioner of the Supreme Court of Missouri.

The Missouri courts have always held that under our constitutional provision it is not necessary to go into detail in writing the title for an act so long as the title is clear. In speaking of a title to an act under our constitution, the Missouri Supreme Court in State vs. Mullinix, 301 Mo. l. c. 390, has this to say of a title:

> "The generality of a title will not affect its validity where it does not tend to cover up or obscure legislation which is in itself incongruous * * * * * The disposition of the courts has always been to avoid thwarting the efficiency or evident salutary effect of legislative action by a liberal interpretation of the constitutional provision."

In speaking of the title of an act, Judge Barclay, speaking for the court, in State ex rel. Dickason et al. vs. County Court of Marion County et al., 128 Mo. l. c. 441, said:

> "The constitutional mandate in regard to the title of a statute does not require a table of contents as a caption to a law. It is sufficient if the title does not mislead as to the chief topic of the act,

and that the minor features of it have a reasonable and natural connection with the subject named in the title * * * * * *.

"Mere generality in the title will not vitiate an act of the general assembly, unless the title is of such a nature as to compel the conviction that it was designed to mislead as to the subject dealt with."

And in State vs. Whitaker, 160 Mo. l. c. 69, 70, heard before the Supreme Court, it was said:

"Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to maintain their validity; infraction of this constitutional clause must be plain and obvious to be recognized as fatal. This has been the uniform rule of construction of this provision of our Constitution. It is only necessary that the title shall indicate the subject of it in a general way without entering into details. All auxiliary provisions properly attaching to the main subject and constituting with it one whole may be embraced within the enactment."

The Missouri Supreme Court, in the case of State ex. inf. Jesse W. Barrett, Attorney-General, vs. Robert Imhoff et al., 291 Mo. l. c. 619, quoting approvingly in part from State vs. Sloan, 258 Mo. l. c. 313, relative to the title of an act, says:

"* * * * It may, therefore, be sufficient to say that the purpose to be subserved by the Constitution in regard to the title of an act is that by its terms it must be such as to serve as a clear and comprehensive indicator of the purpose of the act. While it may be so general as to omit matters germane to the principal features of the statute, if it sufficiently indicates the substantial purpose of the law it will not be violative of the Constitution."

So in the case of State ex. rel. Garesche vs. Roach, 258 Mo. l. c. 559:

> "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid."

Again in Coca-Cola Bottling Company vs. Mosby, 289 Mo. l. c. 472, Judge Walker speaking for the Court said:

> "The State Constitution (Sec. 28, Art. 4) is read to little purpose if it be held to require that the title of an act must present the particularity of an itemized account or the minutiae of a chemical analysis. When the Constitution provides, therefore, that 'no bill..... shall contain more than one subject which shall be clearly expressed in its title,' it simply means that the title shall indicate in an unmistakable manner the general contents of the act; it does not require, nor was it intended that it should descend into particulars, but that it will be sufficient if it defines the nature of the statute and thus informs the reader as to its purpose. The nature of this constitutional provision being thus understood, the tendency of the Courts in numerous rulings has been to construe it liberally in aid of all well directed legislative power."

Appellants in this court and in the court below have attempted to convey the idea that the no par stock act is an amendment to the Missouri Franchise Act. This is not true and was so held by Judge Ragland in the Pierce Petroleum case, supra. The no par stock act is used merely for the purpose of arriving at the value of stock in a corporation having stock with no par value, the Tax Commission then turns to the regular franchise tax act of this state and assesses the franchise tax according to this act.

The title to the no par stock law is set out at page 31 of the record and reads as follows:

> "An act authorizing stock corporations, other than Building & Loan Associations, Trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger, or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

The last three lines of this title are sufficient to cover Section 12, which is the section being attacked by appellant. When the title says, "regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner," they have fully covered the section which provides for an arbitrary value of $100.00. The District Court held that the word "regulating" fully covered the provision of Section 12, and we contend the words "prescribing the method of determining the number of shares and capital of corporations" also cover that part of section 12 which provides an arbitrary value of $100.00 per share on all no par stock for assessing taxes.

III

THE METHOD OF COMPUTING THE FRANCHISE TAX IN MISSOURI DOES NOT DENY EQUAL PROTECTION OF THE LAW

This court has held many times, that the mere fact, a corporation is engaged in interstate commerce does not exempt its property from state taxation, but that the commerce itself, must not be burdened by state exaction, inter-

fering with the exclusive Federal authority over it. In Baltic Mining Company vs. Mass., 231 U. S. 68, l. c. 83, Justice Day speaking for the court said:

> "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained (Citing cases)."

And in State of Maine vs. The Grand Trunk Railway Company of Canada, 142 U. S. l. c. 227-228, the railroad corporation contended that it should not pay an excise tax to the State of Maine, which tax was prorated against said railroad company in proportion to the number of miles of said company's tracks in the State of Maine, on the grounds that this tax was an interference with interstate commerce. Mr. Justice Field held:

> "• • "The privileges of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy . . . . . The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the com-

mand of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. . . . . ."

Continuing, the court said:

"The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied, and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation."

In the case of Home Insurance Company of New York vs. People, the insurance company resisted payment of its franchise tax which had been levied upon its capital stock (said company having a portion of its capital stock in bonds of the United States), contending that it was entitled to a deduction for a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock.

Speaking of the right of the state to grant the privilege of a franchise and impose such a tax, Justice Field, in his opinion, 134 U. S. l. c. 600, has this to say:

"• • • • •The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such condition as its Legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

This court in the case of St. Louis-San Francisco Railway Company vs. Middelkamp, has passed on the franchise tax act of Missouri, and in its opinion in this case holds that the act does not interfere with interstate commerce. This was an injunction proceeding whereby the St. Louis-San Francisco Railway Company attempted to restrain the collection by the State Treasurer of Missouri of the state franchise tax against said railroad.

Justice Holmes, in writing the opinion of the court, 256 U. S. 231, said:

"There is no contravention of the commerce clause. It is said that the value of the franchise tax is derived partly from the fact that the corporation does interstate business, but that does not invalidate the tax . . . ."

Continuing, the Justice said:

> **"Nothing more needs to be said concerning the relation of the act to the Constitution of the United States. As to the Constitution of Missouri, we see no reason to believe that it has been violated, and perceive no indication of such an opinion in the judgments of the supreme court of the state. That court, on the contrary, seems to regard the act as valid."**

IV.

THE MISSOURI NO PAR LAW DOES NOT INTERFERE WITH INTERSTATE COMMERCE.

Simply because a tax is assessed upon and paid by a corporation engaged in interstate commerce does not make that tax necessarily an interference with interstate commerce. In the Postal Telegraph Cable Company vs. Adams, 155 U. S. 688, l. c. 695, Chief Justice Fuller speaking for this court said:

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and

if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The right of the state to place an arbitrary value upon stock for purposes of assessing the franchise tax, has already been decided by this court.

In the case of Roberts & Schaefer Company vs. Louis L. Emmerson, 271 U. S. 50 this point was definitely decided by the court. Justice Stone in concluding the opinion in this case l. c. 57 said:

"These differences, both in the legal incidents and in the practical uses of the two classes of stock not only are a basis for classification of them for purposes of taxation, but make unavoidable certain differences in the method of assessing this tax. Authorized capital stock cannot well be used as the measure of a tax unless some arbitrary value is assigned to the no par shares; for they may be issued from time to time at varying prices, and until issued, they cannot have any value. To require the stock to be issued at a value fixed in advance of its issue, and to make that value the basis of the tax, would in effect abolish no par stock. Because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no par value stock and not result in similar inequalities.

"The inequalities complained of result from a classification which, being founded upon real differences, is not unreasonable, and the discrimination which results from it is not arbitrary or prohibited

by the 14th Amendment. It is enough that the classification is reasonably founded upon or related to some permissible policy of taxation. (Citing cases)"

Recently an Arkansas case came before the court. State ex rel. Attorney-General vs. Margay Oil Company, 169 Ark. 96, 273 U. S. 666. This was a case very similar to the case at bar, with the exception that the Arkansas law provided a par value of $25.00 and did not assess the tax on the surplus, but did assess a tax twice as high as Missouri on the outstanding capital stock which was in use in Arkansas. The opinion in this case is too lengthy to set out in the argument and because of the fact that the entire opinion bears upon the point in question we will not attempt to quote from parts of it. When the case was appealed to this court it was affirmed by a per curiam opinion on the authority of Roberts & Schaefer Company vs. Emmerson, supra.

The appellant in the court below laid much stress on the fact that a $100.00 tax on no par stock was unreasonable. We are unable to agree on this particular point. All par stock in the vast majority of Missouri corporations is issued at $100.00 per share. Why the appellant company, or any other company, desires to issue no par stock we do not know but the fact remains that a state should be permitted, and is permitted to place some value upon that stock for the purpose of arriving at a franchise tax or any other tax, involving capital stock and surplus. If this tax is unreasonable it seems to us the proper remedy lies in the Legislature of the State of Missouri and not in the courts. If it is unreasonable for foreign corporations doing business in the state of Missouri it is unreasonable for domestic corporations doing business in this state, and the charge is made equally against each of those classes of corporations.

When the present case was heard in the court below, International Shoe Company vs. Shartel, 29 Fed. (2nd) l. c. 607, Reeves, District Judge, had this to say:

"In the case at bar, both domestic and non-domestic corporations are subject to the same tax. The state bases its tax upon the property of the corporation having its situs in Missouri exactly as in the case of domestic companies. To all intents and purposes, therefore, it would bring the instant case squarely within the decision of Roberts & Schaefer Co. v. Emmerson, supra. Moreover, an almost parallel case was determined by the Supreme Court of the United States in the case of Margay Oil Corporation v. Applegate, Attorney General, 273 U. S. 666, 47 S. Ct. 458, 71 L. Ed. 830. In that case, as in this a Delaware Corporation doing business in Arkansas became subject to the Franchise Tax Law of that state. The complaint was made there, as here, to the effect that an arbitrary valuation was used as a basis for computing the tax. The Supreme Court of Arkansas in Margay Oil Corporation v. Applegate, Attorney General, 169 Ark. 96, 272 S. W. 845, sustained the tax, and its judgment was affirmed in 273 U. S. 666, 47 S. Ct. 458, 71 L. Ed. 830. The affirmance of said case by the Supreme Court was upon the authority of Roberts & Schaefer v. Emmerson, supra."

CONCLUSION

The principal point which respondents desire to urge upon this court, is that the facts in the case at bar, are not in any way similar to those presented in such cases as Airway Electrical Appliance Corporation vs. Day, Looney vs. Crane Company, and cases of this nature. In these cases the various states were attempting to tax corporations on authorized capital stock which was not outstanding. This court held in that line of cases, and rightly so, that such taxes were an interference with interstate commerce. In Missouri the state franchise tax has never been assessed on stock which was authorized but not outstanding, but solely on the OUTSTANDING capital stock and surplus. This fact alone distinguishes the present case from the long line of cases cited by appellant, both in the court below and in this court.

As to the right of a state to classify stock at a fixed arbitrary value, we rest respondents' case on the cases of Roberts & Schaefer vs. Emmerson, and State ex rel. Applegate vs. Margay Oil Company decided by this court and respectfully submit that the decision as handed down by the District Court should be affirmed.

Respectfully submitted,

STRATTON SHARTEL,
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WALTER E. SLOAT,
Special Assistant Attorney-General,
Solicitors for Respondents.

FILED
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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 779...

INTERNATIONAL SHOE COMPANY, a Corporation,
Complainant,
vs.
STRATTON SHARTEL, Attorney-General of the State of Missouri, and C. EUGENE STEPHENS, State Treasurer of the State of Missouri,
Defendants.

In Equity.

Appeal from the United States District Court, Western District of Missouri.

BRIEF AND ARGUMENT OF JOHN F. GREEN, OF THE ST. LOUIS BAR, AMICUS CURIAE.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Statement.

Corporations represented by amicus 4
History of litigation 5
Construction of Stock Corporation Act by Legislature 5
Construction by state officers 5
Constitutionality not presented in Pierce Petroleum Company case 6

Points and Authorities.

Jurisdiction of this Court to pass upon questions arising under Constitution of Missouri 7
Defective title of Stock Corporation Act of 1921 7
Meaning of word "**regulate**" as used in title 9
Opinion of District Court 11

Argument.

Defective title 15
Analysis of title 16
Meaning of the word "**regulate**" 17
Opinion of District Court on this subject 18
Construction by state officers 19
Strict construction of Section 28 of the Missouri Constitution by the Missouri Supreme Court 21
Defective title of Stock Corporation Act under Section 28 of Article IV of the Missouri Constitution not discussed by the Missouri Supreme Court in Pierce Petroleum Company case 25

Cases Cited.

Berry v. Majestic Milling Co., 284 Mo. 182..... 22
Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, l. c. 97, 69 L. Ed. 183..... 7
City of Carthage v. Rhodes, 101 Mo. 175.....9, 12, 18
Cooley on Const. Limitations (7 Ed.), p. 205..... 8
Cooley on Taxation, Sec. 125, p. 293 .....9, 12, 18
Connecting Gas Co. v. Imes, 11 Fed. (2nd) 191..... 7
Ex parte Smith, 231 Mo. 111.....9, 12, 18
Green v. Louisville Ry. Co., 244 U. S. 499, l. c. 508, 61 L. Ed. 1280, l. c. 1285..... 7
International Shoe Co. v. Shartel, 29 Fed. (2nd), l. c. 607 13
Ohio Tax Cases, 232 U. S. 576, l. c. 586, 58 L. Ed. 737 7
Pierce City v. Hentschell, 210 S. W. Rep. 31.....9, 12, 18
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688 .....9, 12, 13, 18
Southard v. Short, 8 S. W. Rep. (2nd Series) 903 (Mo. Sup. Court).....8, 24
State v. Ashbrook, 154 Mo. 375.....8, 9, 12, 18
State v. Crites, 277 Mo. 194.....8, 22
State v. Fulks, 207 Mo. 26..... 8
State v. Great Western Tea & Coffee Co., 171 Mo. 634 8
State v. Hackman, 292 Mo. 27.....8, 21
State v. Hurley, 258 Mo. 275..... 24
State v. Imhoff, 291 Mo. 663.....8, 21
State v. Pierce Petroleum Corp., Vol. 2 (2nd), S. W. Rep. 730 .....7, 10, 25
State v. Rawlings, 232 Mo., l. c. 558..... 8
State v. Sloan, 258 Mo. 395.....8, 16, 23
Vice v. City of Kirksville, 280 Mo. 348.....15, 22
Woodward Hardware Co. v. Fisher, 269 Mo. 271, l. c. 278 .....8, 15, 23

IN THE

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No. .....

INTERNATIONAL SHOE COMPANY, a Corporation,
Complainant,

vs.

STRATTON SHARTEL, Attorney-General of the State of Missouri, and C. EUGENE STEPHENS, State Treasurer of the State of Missouri,
Defendants.

In Equity.

Appeal from the United States District Court, Western District of Missouri.

BRIEF AND ARGUMENT OF JOHN F. GREEN, OF THE ST. LOUIS BAR, AMICUS CURIAE.

With the consent of counsel for complainant and defendants, we respectfully ask permission of the Court to file herein a brief and argument, as amicus curiae, in behalf

of the following corporations, all of which have been duly authorized to do business in Missouri, and all of which have heretofore issued, under the authority of the respective states of their incorporation, stock of no nominal or par value, viz.:

Rice-Stix Dry Goods Company, St. Louis;
Elder Manufacturing Company, St. Louis;
The Best-Clymer Company, St. Louis;
National Department Stores, Inc., St. Louis;
The Alligator Company, St. Louis;
Stix, Baer & Fuller D. G. Company, St. Louis;
McQuay-Norris Mfg. Company, St. Louis;
Fuel Oil Company of St. Louis, St. Louis;
National Candy Company, St. Louis;
Johnson, Stephens & Shinkle Shoe Company, St. Louis;
Fulton Iron Works, St. Louis;
Pedigo-Weber Shoe Company, St. Louis;
National Bearing Metals Company, St. Louis;
General Grocer Company, St. Louis;
Tobin-Hamilton Leather Company, St. Louis;
Kirkpatrick Mortgage Company, St. Louis;
Wildwood Springs Club Investment Company, St. Louis;
Corneli Seed Company, St. Louis;
American Syrup & Sorghum Company, St. Louis;
Skouras Brothers Enterprises, Inc., St. Louis;
St. Louis Amusement Company, St. Louis;
Boyd-Welsh Shoe Company, St. Louis;
Automobile Discount Corporation, St. Louis;
St. Louis Terminal Warehouse Company, St. Louis;
Parke, Davis & Company;
Bird Grocery Stores, Inc., Kansas City;

White Eagle Oil & Refining Company, Kansas City;
Benzo-Gas Motor Fuel Company, Kansas City;
Cook Paint and Varnish Company, Kansas City;
The Gas Service Company, Kansas City;
Sheffield Steel Corporation, Kansas City;
Montgomery, Ward & Company, Kansas City;
Sears-Roebuck & Company, Kansas City;
Western Auto Supply Company, Kansas City.

Each of these corporations has tendered the amount of its franchise tax, if assessed on the basis of the actual value of its no-par stock, as measured by the value of all its assets that are located or used in the business transacted in Missouri, which amount the state officers have refused to accept.

STATEMENT.

This is an appeal from a decree of the District Court of the United States, Western District of Missouri, denying complainant an injunction against certain state officers. The application for an injunction was heard in the lower court by Judges Reeves and Otis of the District Court, and Judge Stone of the United States Circuit Court of Appeals of the Eighth Circuit. Complainant contends that Section 12 of the Stock Corporation Act of Missouri enacted by the State Legislature in 1921 and found in the present Session Acts of 1921, beginning on page 601, is unconstitutional and void. This act, consisting of fifteen sections, authorizes the organization of domestic corporations under the Laws of Missouri without nominal or par value and prescribes the conditions and regulations under which such no-par stock may be issued. This Stock Corporation Act of 1921 is set out in full in the brief filed on behalf of the International Shoe Company, to which we refer. The controversy here involves the validity of Section 12 of the said Stock Corporation Act of 1921, as construed by the Supreme Court of Missouri, under the Constitution of Missouri and also under the Constitution of the United States.

In so far as the Constitution of Missouri is concerned it is contended that said Section 12 of the Stock Corporation Act violates Section 28 of Article IV of the Missouri Con-

stitution in that the **title** of the Act does not indicate the purpose to enact a law such as Section 12 has been construed to be. It is also contended that said Section 12 of the Stock Act, as construed by the Supreme Court of Missouri and held to apply to foreign as well as domestic corporations, violates the "equal protection," the "due process," and "commerce" clauses of the United States Constitution.

HISTORY OF LITIGATION.

Construction of Section 12 by State Legislature.

The Stock Corporation Act of 1921 was approved April 12, 1921, and became the law ninety days thereafter on July 11, 1921. On August 4, 1921, the Legislature of Missouri met in special session to amend the corporation franchise tax laws of the state, and did repeal the old Corporation Franchise Tax Law and enact a new law in its place. But it did not incorporate in the new law the provisions of Section 12 of the Stock Corporation Act of 1921, but said amended franchise tax law of the state provides for the assessment of no-par stock stock on the basis of the value of the property used in the business transacted in the state, just as it had been assessed theretofore.

Construction by State Officers.

For the first six years after the enactment of the State Corporation Act of 1921 the state officers construed Sec-

tion 12 as having no application to **franchise taxes**, but continued to assess corporation franchise taxes upon the basis of the value of the property used in business conducted in the state, without regard to whether the stock was issued with or without par value. Then, in 1927, for the first time the state officers attempted to assess franchise taxes against all corporations having no-par stock upon the basis of an arbitrary value of $100.00 per share for all no-par stock. Thereupon the Pierce Petroleum Company, a foreign corporation with no-par stock, authorized to do business in Missouri, filed a suit to test the validity of such an assessment. The Supreme Court of Missouri then held in this test case that Section 12 of the Stock Corporation Act of 1921 had been properly construed by the state officers and justified an assessment of all no-par stock at an arbitrary valuation of $100.00 per share. In this test case no questions were presented to the Supreme Court of Missouri, and none were considered by it, relating to the constitutionality of said Section 12 of the Stock Corporation Act under the provisions of the Missouri Constitution or the Constitution of the United States, because learned counsel for the Petroleum Company in that case were so confident of their contentions as to the proper construction of Section 12 that they failed to present any argument as to its constitutionality.

BRIEF.

I.

The District Court, having jurisdiction on account of questions arising under the Constitution of the United States, this court, on appeal, should consider and pass upon all questions presented, whether they arise under the Federal Constitution or under the State Constitution.

Green v. Louisville Ry. Co., 244 U. S. 499, l. c. 508, 61 L. Ed. 1280, l. c. 1285;
Connecting Gas Co. v. Imes, 11 Fed. (2nd) 191;
Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, l. c. 97, 69 L. Ed. 183;
Ohio Tax Cases, 232 U. S. 576, l. c. 586, 58 L. Ed. 737.

This proposition is so well established in federal law that it needs no further argument or citation of authorities to support it.

II.

Defective Title.

Under the decisions of the Supreme Court of Missouri, Section 12 of the Missouri Stock Corporation Act of 1921, as construed by the Supreme Court of Missouri in the case of State v. Pierce Petroleum Corporation, reported in Vol. 2 (2nd), Southwestern Reporter, page 790, is unconstitu-

tional and void because the title of the act does not comply with the provisions of Article IV, Section 28, of the Constitution of Missouri, relating to subjects and titles of legislative acts.

Southard v. Short, 8 S. W. Rep. (2nd Series) 903 (Mo. Sup. Court);
State v. Hackman, 292 Mo. 27;
State v. Imhoff, 291 Mo. 603;
State v. Ashbrook, 154 Mo. 375;
Woodward Hardware Co. v. Fisher, 269 Mo. 271, l. c. 278;
State v. Sloan, 258 Mo. 305;
State v. Rawlings, 232 Mo., l. c. 558;
State v. Fulks, 207 Mo. 26;
State v. Great Western Tea & Coffee Co., 171 Mo. 634;
State v. Crites, 277 Mo. 194;
State v. Sloan, 258 Mo., l. c. 313;
Cooley on Const. Limitations (7 Ed.), p. 205.

The title of this act is in the following language:

"An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provision, upon formation, reorganization, merger or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations, and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

This title specifies only three things as included therein, namely: (1) The issuance by Missouri corporations of common and preferred stock without nominal or par value; (2) regulating the same and such corporations; and, (3) prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner.

Clearly there is no suggestion in this title of an amendment to the **Corporation Franchise Tax Law** authorizing an unreasonable and arbitrary basis for, and a radical increase in the amount of franchise taxes assessed against corporations having no par stock.

(a)

The reference in the title of the act to the "**regulation**" of such corporations does not disclose an intent to levy a **franchise tax for revenue**. It may reasonably be held to indicate a **license tax** under the police powers of the state, but clearly does not disclose a purpose to levy a franchise tax, which is a tax for **revenue**; or to change the method of assessing **franchise taxes for revenue**. Section 12 of the act which attempts to do this is therefore invalid.

Pierce City v. Hentschell, 210 S. W. Rep. 31;
City of Carthage v. Rhodes, 101 Mo. 175;
State v. Ashbrook, 154 Mo. 375;
Ex parte Smith, 231 Mo. 111;
Cooley on Taxation, Sec. 125, p. 293;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688.

(b)

The question of the validity of Section 12 of the Stock Corporation Act of 1921, under this provision of the Constitution of Missouri, was not presented to the Supreme Court of Missouri in the Pierce Petroleum Corporation case and was not considered by that Court in its opinion.

See State v. Pierce Petroleum Corp., Vol. 2 (2nd), S. W. Rep. 790.

This opinion of the Supreme Court of Missouri shows clearly that this question was not considered by it, and it was not submitted in the briefs filed by counsel in that case.

(c)

Construction by State Officials.

Section 12 of the Stock Corporation Act of 1921 was **for six years** construed and understood by the state officers charged with the duty of its enforcement to apply merely to the **organization tax** imposed on domestic corporations having no par stock and not to be an amendment to the Corporation Franchise Tax Law. This fact alone shows that the **title** of the act does not comply with this provision of the Constitution by clearly stating its subject and purpose.

(d)

Construction by State Legislature.

The Stock Corporation Act of 1921, providing for the issue of no-par stock, was approved April 12, 1921, and became a law ninety days thereafter on July 11, 1921. Thereafter, on August 4, 1921, the State Legislature, in special session, revised the entire Corporation Franchise Tax Law of the state, but did not embody in this revised and amended franchise tax law any of the provisions of Section 12 of the Stock Corporation Act, then in full force, which, as construed by the Supreme Court, applies to franchise taxes to be assessed on no-par stock, as well as to organization taxes of such corporations, showing that the Legislature itself did not understand that said Section 12 of the Stock Corporation Act was intended to apply to franchise taxes.

IV.

The District Court, in its opinion denying an injunction against state officers, held that the word **"regulate,"** which is used in the title to the Stock Corporation Act of 1921, is broad enough to include a **franchise tax for revenue**, and indicates a purpose to levy that kind of a tax.

See 29 Fed. (2nd), l. c. 607.

With due deference to the learned Judges who concurred in that opinion we submit that the word "regulate"

in the connection in which it is used in the title to this act means merely an inspection fee or an organization or license fee paid when a corporation is licensed to do business in Missouri, and cannot be construed to mean or include a tax for **revenue purposes**, such as an annual franchise tax. The opinion of the lower court on this point is contrary to all legal authority.

It is elementary in law that governments may levy taxes:

1. Under the police power—the power to regulate.

2. Under the power to raise revenue.

It is equally elemental that the power to tax under the police power is based upon the governmental power to "**regulate**" relative rights, privileges and duties as between individuals and corporations, to conserve by "**regulations**," order in the political society, to encourage by "regulation" industry or to discourage by "**regulation**" any pernicious employments or practices.

The meaning of "regulate" and "tax under **police power**" are synonymous and cannot be extended to include an annual **tax for revenue**.

This is the uniform holding in the State of Missouri and is a well-settled principle in our jurisprudence.

City of Carthage v. Rhodes, 101 Mo. 175;
Ex parte Smith, 231 Mo. 111;
Pierce City v. Henschell, 210 S. W. 31;
State v. Ashbrook, 154 Mo. 375;
Cooley on Taxation, Sec. 125, p. 293;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688.

V.

Equally fallacious is the reasoning of the lower court in holding that Section 12 of the Stock Corporation Act, as construed by the Supreme Court of Missouri in the Pierce Petroleum Company case, supra, "**is not a statute providing for taxes. That it merely undertakes to provide a method of computing taxes upon corporations** issuing stock without nominal or par value."

See International Shoe Co. v. Shartel, 29 Fed. (2nd), l. c. 607.

Any law which has the effect of increasing the franchise tax levied upon a corporation from $26,000 to $104,000, as this law does in the case of the International Shoe Company, must necessarily be a statute providing for taxes and it is an idle play upon words to say that it merely provides a new "method of **computing** taxes upon corporations issuing stock without nominal or par value." It is the substance which determines the validity of a statute and not the shadow—it is the practical effect of the law and not the name by which it is called which determines its character.

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688

If the reasoning of this opinion of the District Court on this point is sound, then the Legislature might enact a law

appropriating funds for state institutions out of the proceeds of state income taxes and embody in it a provision to the effect that thereafter state income taxes should be computed and assessed at the rate of 1½ per cent, instead of 1 per cent, without any reference in the title to such provision for increase of income taxes, because it would merely provide a different **method of computing the tax**. We submit that such reasoning is fallacious.

VI.

All questions in the case arising under the Federal Constitution are ably presented in the briefs filed herein by counsel for the International Shoe Company and we adopt their brief upon those questions.

ARGUMENT.

I.

Defective Title.

Section 28 of Article IV of the Constitution of Missouri provides:

> "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title."

The Supreme Court of Missouri, in the case of Vice v. City of Kirksville, 280 Mo. 348, construing this section of the Constitution, said:

> "It is evident that the framers of the Constitution in the enactment of section 28, supra, were attempting to guard the people of our state against fraudulent, misleading and improper legislation by providing that the title to the act should indicate in some way the kind of legislation that was to be had thereunder."

In the case of Woodward Hardware Co. v. Fisher, 269 Mo. 271, the Court said:

> "It is manifest that the framers of our Constitution inserted in the organic law the above provision in order that the members of the General Assembly, when reading the title to an act, shall be advised, at least in a general way, of the subject sought to be covered in the body of same."

In the case of State v. Sloan, 258 Mo. 305, the Court said:

> "The purpose of a title is to serve as a clear and comprehensive indicator of the purport of the act. While it may be so general in its terms as to omit reference to or expression of the matters germane to the principal features of the statute, if it sufficiently indicates the substantial purpose of the law, it will not be violative of the Constitution; but where a title descends to particulars and specifies a certain class included within the provisions of the act, to the exclusion of others, it does not sufficiently indicate the purport of the law, and is to that extent violative of the constitutional provision."

The title of the Stock Corporation Act of 1921 reads as follows:

> "An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger, or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

It is manifest that this title is not **general** in its terms and language, but that it goes into specific details and

attempts to state with particularity exactly what the bill is intended to cover and include.

(1)

It authorizes corporations to provide for the issue of both common and preferred stock without nominal or par value. This paragraph could, in the nature of the case, apply only to domestic corporations.

(2)

It specifies enactment of laws **regulating** the same (no-par stock issues) and **such corporations** (domestic corporations) issuing no-par stock.

(3)

And it also specifies the method of determining the **number of shares and the capital** of corporations issuing shares in such manner (no-par shares).

It is clear that the **title** of this act refers only to **domestic** corporations, because the Legislature of Missouri had no power to **authorize** the issue of no-par stock by a foreign corporation, or to **regulate** such issue by a foreign corporation, or to **determine the number of shares or the capital** of foreign corporations issuing such no-par stock.

Certain it is that there is nothing in the **title** that indicates an intention to amend or change the then existing **franchise tax law** of Missouri covering both foreign and domestic corporations. The word "**regulate**" might be

held to indicate a **license** tax under the police powers of the state, but it does not suggest to the mind a **franchise tax for revenue**, covering both domestic and foreign corporations. The word "regulate" in such connection has a well-defined meaning in the law of Missouri and in general law and has never been held to cover or include a tax for **revenue purposes.**

State v. Ashbrook, 154 Mo. 375;
City of Carthage v. Rhodes, 101 Mo. 175;
Pierce City v. Heutschell, 210 S. W. Rep. 31;
Ex parte Smith, 231 Mo. 111;
Cooley on Taxation, Sec. 125, p. 293;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688.

Cooley on Taxation, Sec. 125, p. 293, says:

> "Delegation of power to tax confers no authority to license for the purpose of regulation, and, conversely, delegation of the power to license or regulate confers no authority to tax for the purpose of revenue."

The Missouri cases cited above all recognize the clear distinction between authority to **regulate** and authority to levy a **tax for revenue.**

(a)

The opinion of the District Court in holding that the word "**regulate,**" found in the title, indicates an intention to levy an **annual franchise tax for revenue** is opposed to all the decisions of the Supreme Court of Missouri on this

subject and is not supported by general law, which makes a clear distinction between a license or regulatory tax under the police power, and a franchise tax for revenue.

See cases, supra, in brief.

(b)

The further statement in the opinion of the District Court that Section 12 of the Stock Corporation Act, as construed by the Supreme Court in the Pierce Petroleum Corporation case, does not provide for any franchise tax on no-par stock, and does not amend the law relating to assessment of franchise taxes on no-par stock, but merely provides a different **method for computing the tax**, is, we submit, a manifest fallacy, because it is the practical effect of the law, and not its language alone, which determines its character. The practical effect of this amendment was to increase the franchise tax of the International Shoe Company from approximately $26,000 to $104,000.

Cases under point IV of brief.

Construction by State Officers.

Most convincing and conclusive evidence that the **title** to this Stock Corporation Act does not clearly indicate that it authorized the arbitrary valuation of the no-par stock issued by corporations doing business in Missouri at $100.00 per share, for the purpose of assessing franchise

taxes, is the fact the members of the State Tax Commission, the Attorney-General, and other state officers, charged with the duty of construing and enforcing the law and assessing franchise taxes thereunder, did not discover that this act was intended to apply to foreign corporations having no-par stock for six or seven years after its enactment, but continued for that length of time to assess such franchise taxes on the basis of the actual value of such no-par stock. If the **title** of this act is as clear as the State Constitution requires it to be, then why was it not followed and enforced the first six years after its enactment into law? The fact that it required six long years for these lynx-eyed public officials, who were all the time diligently searching for additional state revenue, to discover that the Legislature, by said section 12, intended to arbitrarily value no-par stock at $100.00 per share for **franchise taxes**, conclusively shows that this intention was not clearly enough expressed in the title to satisfy constitutional requirements.

How could the members of the State Legislature or the officers of the corporations affected have discovered that this was the true meaning and intent of said act from the **wording of its title** in time to oppose its enactment into law if it required six years' study for the expert state tax officials to discover that such was its meaning?

Strict Construction of This Constitutional Provision by the Missouri Supreme Court.

In the case of **State v. Imhoff, 291 Mo. 603**, the Court construed an act relating to balloting for constitutional amendments having the following title:

> "An Act to repeal Sections 5970 and 5971 of Article VII of Chapter 43, Revised Statutes 1909, relating to constitutional amendments, providing for official titles to all proposed constitutional amendments and the manner and form of printing same upon the official constitutional ballots."

The body of this act provided for the submission of other propositions on the constitutional ballot and the Court held this provision invalid because the **title** of the act did not refer to any subject except that of amendments to the Constitution.

In **State v. Hackman, 292 Mo. 27**, the title of the act construed specified that it was an act **relating to the** issue of bonds by municipal corporations, which might bear interest at a rate not exceeding 6 per cent per annum and might be sold at not less than ninety-five per cent of the par value thereof.

In the body of the act was a requirement that the notice of any election held to authorize the issue of such bonds should specify the **rate of interest thereon.** This provision

was held to be void because not covered or included in the title.

In **Berry v. Majestic Milling Co., 284 Mo. 182**, the **title** of the act considered by the Court provided for the **regulation** of the employment of children between 14 and 16 years of age. One section of the act **prohibited** the employment of children of that age in certain industries. This section the Court held to be invalid because the title did not indicate that this was the purpose of the act.

In **Vice v. City of Kirksville**, 280 Mo. 348, the title of the act under consideration specified that it was an act to authorize municipal corporations to erect and maintain water works, etc. In the body of the act was a provision exempting such municipal corporations from liability for negligence in the operation of such utilities. This provision was held invalid because the **title** of the act did not indicate that there was any such provision in it.

In **State v. Crites, 277 Mo. 194**, the construed act related to regulating legislative agents, etc., and the Court said:

> "If the title had merely referred to 'regulating legislative counsel and legislative agents' generally it would have been all right, but when the title went on to specify certain restrictions and omitted mention of certain other restrictions, it thereby failed clearly to express the subject.
>
> "In the law under consideration the title to the act indicates that certain acts shall be required and certain acts prohibited. That part of the act with which

we are concerned prohibits totally different acts and acts which the title indicates are perfectly lawful." (This case reviews earlier cases on the point.)

In **Woodward Hardware Co. v. Fisher, 269 Mo. 271,** the Court construed an act, the title of which referred merely to the annual registration and reports of corporations. In the body of the act was a provision undertaking to make the officers and directors individually liable as partners for the debts of the corporation in case it did not comply with the law. The Court held this provision void because not specified in the title.

In **State v. Sloan, 258 Mo. 305,** the Court considered an act having the following title:

> "An act to amend Sec. 794 of Article VI of Chapter 6 of the Rev. Stat. of Mo. 1909, entitled, 'Herding by Nonresidents,' by adding certain amendments thereto."

The body of the act contained provisions for herding by **residents** as well as **nonresidents**, and the Court held it void because the title contained no reference to residents.

The title of the Stock Corporation Act of 1921 contains no reference whatsoever to **foreign** corporations. Why, then, does it not come under the condemnation of the opinion of the Supreme Court in the case of State v. Sloan, supra?

In **State v. Hurley, 258 Mo. 275**, the title of the act construed was as follows:

> "An Act to amend Chapter 67 of the Revised Statutes of Missouri * * * relating to fish, by adding an article thereto to be known as Article III and to be entitled 'The Protection and Preservation of Fish,' and to provide penalties for the violation thereof."

Certain sections of the act then provided penalties for having and selling dynamite, powder, etc., without having a permit and for failure to file an affidavit as to the use of such dynamite and powder.

A delivery man of a powder company was arrested and convicted.

The Supreme Court, in construing this act, said that the requirements of a permit and affidavit from persons or companies handling explosives generally are incongruous and not fairly within the purview of the title.

The latest decision of the said court on this subject is that of **Southard v. Short, Vol. 8 (2nd Series), S. W. Rep., p. 903.**

The Court considered in this case the validity of the Act of 1921 relating to illegitimate children. The title to this act specified merely that it related to "descents and distributions," but the body of the act contained a section providing that the mother of a child born out of wedlock might institute a suit to establish the paternity of such child, etc. It was held that this provision was void be-

cause the title of the act did not refer to such an action or suit.

This list of decisions of the Supreme Court of Missouri on this subject might be multiplied indefinitely. They are sufficient, we believe, to clearly establish that the title of the Stock Corporation Act of 1921 does not contain any sufficient reference to an amendment of the corporation franchise tax law of the state and, therefore, section 12 of said act, as construed in the Pierce case, supra, is unconstitutional and void under the State Constitution.

We do not ask or expect this Court to go beyond these decisions of the Supreme Court of Missouri in passing on the sufficiency of the title of the Stock Corporation Act of 1921. But, if this Court will only apply to the consideration of this title the same rules and principles the Supreme Court of Missouri has applied in similar cases, we are confident the tax provisions of said act must be held void.

II.

This Point Not Decided by Supreme Court of Missouri.

If this question of defective title had been presented to the State Supreme Court in the case of State v. Pierce Petroleum Corporation, Vol. 2 (2nd) S. W. Rep. 790, and decided by that Court adversely to our contentions here, then no doubt this Court would be inclined to follow such ruling. But this particular was not presented by briefs

of counsel in that case and was not mentioned or considered by the Supreme Court in its opinion. Learned counsel who represented the Pierce Petroleum Corporation in that case were so confident of gaining a decision on other points that this point was not presented to the Court.

III.

Other questions in this case, arising under the Federal Constitution, have been so fully and ably presented by counsel for the International Shoe Company in the briefs filed herein that we adopt their arguments in presenting those questions without attempting to repeat them.

Respectfully submitted,

JOHN F. GREEN,
Amicus Curiae.

SUBJECT INDEX.

	Page.
Suggestions in opposition to appellant's petition for rehearing	1
Opinion in Court below—International Shoe Company vs. Shartel, 29 Fed. (2d.) 604	4

CASES CITED.

Gilliland Oil Company vs. Arkansas, 274 U. S. 717, 71 L. Ed. 1322, affirming 171 Ark. 415, 285 S. W. 16	3
Home Insurance Company of New York vs. People, 134 U. S. 594-606, 33 L. Ed. 1025	3
Hump Hairpin Company vs. Emmerson, 258 U. S. 290, 66 L. Ed. 622	3
Macallen Company vs. Massachusetts, case No. 578, May 27, 1929	4
Maine vs. Grand Trunk Railway Company, 142 U. S. 217, 35 L. Ed. 994	3
Margay Oil Corporation vs. Applegate, 283 U. S. 666, 77 L. Ed. 830, affirming 167 Ark. 614, 269 S. W. 63, 169 Ark. 96, 272 S. W. 845	3
People of the State of New York vs. Latrobe, Case No. 601, United States Supreme Court, decided May 13, 1929, No. 12, United States Supreme Court Advance Opinions, June 1, 1929, p. 407	3-4
Roberts & Schaefer Company vs. Emmerson, 271 U. S. 50-57, 70 L. Ed. 827	3
St. Louis, San Francisco Railway Company vs. Middlekamp, 256 U. S. 226, 231-232, 65 L. Ed. 905	3

	Page
State vs. Pierce Petroleum Corporation, 2 S. W. (2d.) 790	1-2-3
State ex rel. Marquette Hotel Investment Company vs. State Tax Commission, 282 Mo. 213, 221 S. W. 721	3
State ex rel. Missouri Pacific Railroad Company vs. Danuser et al., 6 S. W. (2d.) 907	1-3
Section 9790, R. S. Mo. 1919	2
Section 12, pp. 664-5, Laws of Mo. 1921	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 579.

INTERNATIONAL SHOE COMPANY, *Appellant*,

vs.

STRATTON SHARTEL, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, AND C. EUGENE STEPHENS, STATE TREASURER OF THE STATE OF MISSOURI, *Appellees*.

SUGGESTIONS IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING.

The appellant in its petition for rehearing, misconceives the nature, purpose and application of the Missouri franchise tax laws and the fundamental reasons for the courts holding that the states have authority to prescribe any reasonable non-discriminatory basis or measure for such taxes.

The Missouri annual franchise tax laws, including the provision that each share of non-par stock shall be considered the equivalent of a share having a par value of one hundred dollars, were enacted according to the requirements of the Constitution of the State and do not violate any of its provisions.

State ex rel. Missouri Pacific Railroad Company vs. Danuser et al., 6 S. W. (2d.) 907.

State vs. Pierce Petroleum Corporation, 2 S. W. (2d.) 790.

The provisions of Section 12, pages 664 and 665, Laws of Missouri, 1921, (page 57, appellant's original brief herein)

applies equally to domestic and foreign corporations, and for the purpose of computing organization taxes, taxes on the privilege of entering the State, or annual franchise taxes, each share of stock without par value shall be considered the equivalent of a share having a par value of one hundred dollars. The appellant voluntarily engaged in business in Missouri, and came into the State under the express provision of Section 9790, R. S. Mo. 1919, which is in part as follows:

> "• • • • and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." State vs. Pierce Petroleum Corporation, 2 S. W. (2d.) 790.

The Missouri annual franchise tax is not a tax on property but is a tax on the privilege of doing business in the State. It is non-discriminatory and bears equally on domestic and foreign corporations, and in each instance is based upon the proportion that the property and assets of the corporation employed in business in this State bears to all its property and assets wherever located. The tax is measured by one-twentieth of one per cent on such proportion of the outstanding capital stock and surplus of the corporation, each share of non-par stock being considered the equivalent of a share of the par value of one hundred dollars. The tax amounts to five cents per share on such proportionate part of the non-par stock. The measure adopted by Missouri is definite and certain; it constitutes no burden on interstate commerce; it applies equally to foreign and domestic corporations; the property and assets of the corporation employed in business outside of the State is excluded in computing the tax; it is confined to outstanding shares of stock; in fact it meets every test and the court rightfully held it to be valid.

People of the State of New York vs. Latrobe, Case No. 601, United States Supreme Court, decided May 13, 1929, No. 12 United States Supreme Court Advance Opinions, June 1, 1929, p. 407.

Margay Oil Corporation vs. Applegate, 273 U. S. 666, 71 L. Ed. 830, affirming 167 Ark. 614, 269 S. W. 63, 169 Ark. 96, 272 S. W. 845.

Gilliland Oil Company vs. Arkansas, 274 U. S. 717, 71 L. Ed. 1322, affirming 171 Ark. 415, 285 S. W. 16.

Home Insurance Company of New York vs. New York State, 134 U. S. 594-606, 33 Law Ed. 1025.

Hump Hairpin Company vs. Emmerson, 258 U. S. 290, 66 Law Ed. 622.

Maine vs. Grand Trunk Railway Company, 142 U. S. 217, 35 L. Ed. 994.

Roberts & Schaefer Company vs. Emerson, 271 U. S. 50-57, 70 L. Ed. 827.

State ex rel. Missouri Pacific Railroad Company vs. Danuser et al., 6 S. W. (2d.) 907.

State vs. Pierce Petroleum Corporation, 2 S. W. (2d.) 790.

St. Louis, San Francisco Railway Company vs. Middlekamp, 256 U. S. 226, 231-232, 65 L. Ed. 905.

State ex rel. Marquette Hotel Investment Company vs. State Tax Commission, 282 Mo. 213, 221 S. W. 721.

No tax was computed on the $51,086,445.15 surplus the corporation claimed to have. Such surplus was purely arbitrary and determined by the corporation ascribing the value of approximately $9.60 to each share of non-par stock and adding such valuation to the 100,000 shares of preferred stock of the par value of one hundred dollars per share, and deducting the total thus obtained from the valuation placed by the corporation on its property and calling the remainder surplus. The corporation made no allowance of value for the good will of the going concern, nor for the dividend

earning power of the shares of stock. There can be no surplus in a wholly non-par stock corporation, and a surplus could only exist in a corporation having both par and non-par stock by assuming that the non-par stock had a certain value.

As pointed out by the trial court in this case, 29 Fed. (2d.) 604, and by the Supreme Court of the United States in case No. 579, decided May 13, 1929, No. 12 United States Supreme Court Advance Opinions, June 1, 1929, page 411, and in the case of People of the State of New York vs. Latrobe, case No. 601, Supreme Court of the United States, decided May 13, 1929, the cases cited by the appellant as sustaining its position have no application to the facts in this case.

The case of Macallen Company vs. Massachusetts, No. 578, Supreme Court of the United States, decided May 27, 1929, No. 13, United States Supreme Court Advance Opinions, June 15, 1929, page 531, has no bearing on the case at bar because the court found in that case that the tax was in fact a tax on the income derived from tax exempt bonds of the United States and other tax exempt securities, and that it was the purpose and intent of the law there in question and held to be invalid, to tax such income.

We respectfully submit that under the authorities cited supra and other cases cited in our original brief, that the decision of the court in this case is right and sustained by all of the authorities bearing on similar facts. We therefore ask that the rehearing be denied.

Respectfully submitted,

STRATTON SHARTEL,
Attorney-General of the State of Missouri.
WALTER E. SLOAT,
SMITH B. ATWOOD,
LIEUTELLUS CUNNINGHAM,
Assistants,
Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1928.

International Shoe Company, Appellant, *vs.* Stratton Shartel, Attorney General of the State of Missouri, and C. Eugene Stephens, State Treasurer of the State of Missouri.	Appeal from the District Court of the United States for the Western District of Missouri.

[May 13, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This is a direct appeal under § 266 of the Judicial Code from an order of a district court of three judges for the Western District of Missouri, denying an interlocutory injunction restraining the appellees, state tax officials, from levying and collecting certain franchise taxes assessed under the Corporation Annual Franchise Tax of Missouri, 29 F. (2d) 604. The case involves, among others, the questions this day decided in *New York* v. *Latrobe*, No. 601, October Term, 1928, *ante*, p. —.

Section 9836 of the Missouri Revised Statutes imposes an annual franchise tax upon both foreign and domestic corporations of 1/20th of 1% of the par value of their outstanding capital stock and surplus employed in business within the state. For the purpose of ascertaining the tax every corporation subject to it is "deemed to have employed" within the state "that proportion of its entire [outstanding] capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The Stock Corporation Act of the Missouri Laws of 1921, p. 661, first provided for the formation and regulation of corporations with stock of no par value. By § 12 of that act it was enacted that for the purpose of ascertaining any organization taxes imposed by the laws of the state, computed on the basis of the par

value of shares of stock, each share of stock without nominal or par value should be considered the equivalent of a share having a par value of $100. In *State of Missouri* v. *Pierce Petroleum Corporation*, 2 S. W. (2d) 790, the Supreme Court of Missouri held that this section supplemented and amended the earlier provisions of the franchise tax law of the state by prescribing the method of computing the tax, imposed by § 9836, in the case of corporations having non-par stock. The tax was thus fixed in effect at the rate of 5 cents on each share of non-par stock employed within the state regardless of its actual value.

Appellant is engaged in the business of manufacturing and selling shoes in both intrastate and interstate commerce. It has gross assets of more than $97,000,000, of which 54% are located in Missouri. It has 100,000 shares of preferred stock of the par value of $100 and 3,760,000 shares of non-par stock, for which latter it received $9.60 per share. The total paid in capital was thus $46,082,631.09. Appellant alleges that prior to the enactment of § 12, its non-par stock was assessed on the basis of the amount paid for it. Cf. *State* v. *Freehold Investment Co.*, 305 Mo. 88, 103. But, applying the statute as interpreted by the state court in *State* v. *Pierce Petroleum Corp.*, *supra*, the taxing authorities have assinged to appellant's outstanding non-par stock a value of $376,000,000, resulting in an increase of appellant's annual franchise tax from approximately $25,000 to a sum in excess of $100,000.

The market value of appellant's stock does not appear and no foundation is laid for assailing the tax as so excessive as to be a denial of due process, but appellant argues, as did respondent in No. 601, *New York* v. *Latrobe*, *supra*, that the tax is a denial of the equal protection of the laws. For reasons, stated more at length in our opinion in that case, we conclude that the present statute does not infringe that clause of the Fourteenth Amendment. Although it directs that the tax be ascertained by assigning a specific value to the non-par stock, and applying to it the rate applicable to par value stock, the resultant inequalities do not differ from those complained of in that case where the tax was computed at a flat rate on non-par stock, used in the state, without assigning to it any value.

The assignment to the shares of a value in excess of their present worth or of the present value of the assets within the

state does not operate to tax property or business without the state. The tax is a privilege and not a property tax. Giving to the shares a specified value by which the tax is measured, only affects the rate of tax on the privilege and does not give the statute an extraterritorial effect. The result is the same as if a flat tax of 5 cents per share upon that part of the capital which is justly apportioned to the state had been imposed. So apportioned the tax cannot be said to reach the property or the franchise of the corporation without the state.

Other objections to the tax require but brief comment. The mere fact that a corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696. Appellant does a substantial amount of local commerce. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S. 226, 231 (ruling on the Missouri franchise tax); *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, &c. Railway Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, &c. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Southern Railway Co.* v. *Watts*, 260 U. S. 519; cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37. The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, *Looney* v. *Crane Co.*, 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle*, No. 278, October Term, 1928, *ante*, p. —, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state.

It is urged also that the Stock Corporation Act of 1921 violates § 28 of Article IV of the Missouri constitution, which provides that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title." The title of the Act in terms described it as authorizing corporations to make provision " . . . for the issue of either or both preferred or common shares without

nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

It is said that as § 12 operates, by reference to the Franchise Tax Law, to change the tax on corporations having non-par stock, it is in effect a taxing act and hence its title does not clearly express the subject of the legislation. But its subject was the method of ascertaining the value of non-par shares for taxation and other statutory purposes, a subject matter clearly embraced in the title which described the legislation as "regulating" corporations having non-par stock and as "prescribing the method of determining . . . the capital of corporations" issuing such shares. The purpose of the constitutional provision is "to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation". See *Posados* v. *Warner, Barnes & Co.*, No. 251, October Term, 1928, April 22, 1929; *Dickason* v. *County Court*, 128 Mo. 427, 441, and it is only necessary that the title indicate the subject so as to give notice of the general character of the legislation without entering into minute details. *Dickason* v. *County Court, supra*, at p. 441; *Garesche* v. *Roach*, 258 Mo. 541, 560; *Cocoa Cola Bottling Co.* v. *Mosby*, 289 Mo. 462, 472; *Barrett* v. *Imhof*, 291 Mo. 603, 619; *State* v. *Mullinix*, 301 Mo. 385, 389; *Missouri Pacific R. R. Co.* v. *Danuser*, 6 S. W. (2d) 907. The title of the present act satisfies these requirements. One having but slight familiarity with earlier Missouri legislation would have known that upon the enactment of legislation dealing with corporations having a non-par stock, some method of assigning a value to such stock might appropriately be adopted in order to adapt and subject the new type of corporation to existing legislation. This purpose was plainly and sufficiently anticipated in the title of the present act. It was not necessary that the title should go further and indicate the earlier laws which were thus made applicable to the new type of corporation.

Affirmed.

Mr. Justice McReynolds thinks the effect of the statute is to tax property beyond the state.